

Affirmed and Memorandum Opinion filed September 20, 2022.



In The

Fourteenth Court of Appeals

NO. 14-22-00220-CV

IN THE INTEREST OF L.E., A CHILD

**On Appeal from the 315th District Court
Harris County, Texas
Trial Court Cause No. 2020-00219J**

MEMORANDUM OPINION

Appellant E.D. (Mother) appeals the trial court's final order terminating her parental rights to her daughter L.E. (Lee), and appointing the Department of Family and Protective Services (the Department) as sole managing conservator of the child.¹ Mother complains the evidence is legally and factually insufficient to support any of the trial court's four predicate findings for termination or the best-interest finding. She also complains that the trial court abused its discretion by appointing the Department as the sole managing conservator of Lee. We affirm.

¹ To protect her identity, we use pseudonyms to identify the minor and those through whom she could be identified. See Tex. R. App. P. 9.8.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Department's Referral and Removal of Lee

The removal affidavit², attached to the petition seeking to terminate Mother's parental rights, reports that on December 14, 2019, the Department received a referral for neglectful supervision of Lee³ at the Baytown residence where she lived with Mother, Father, Maternal Grandmother ("Grandmother"), Maternal Grandfather ("Grandfather"), Maternal Uncle ("Uncle"), Maternal Uncle's girlfriend, and Cousin, also a minor.

According to the affidavit, Lee was heard crying from inside a room with her parents. The affidavit reports that Mother and Grandmother were engaged in an argument near Lee. Grandmother told investigators that after Grandmother advised Mother to assist in the upkeep of the home, verbal arguments followed, including arguments on the topic of the ownership of a car on the property, that Mother pulled Grandmother's hair and hit her in the face, and eventually Mother "grabbed a loaded gun and pointed it at [Grandmother]." When law enforcement arrived, Mother and Grandmother reportedly continued to argue. Grandmother said the fight prompted Father to secure Lee to the living room. The affidavit reports that multiple residents of the home were arrested, including: Mother, who was arrested for assault, Father, who was arrested for possession, and Uncle, who was arrested for traffic tickets. Reluctantly, Mother (under arrest) consented for Lee to remain with Grandmother.

The investigator reported that Grandmother advised that she originally called the police after mother pointed the gun at her face. Grandmother stated that

² The removal affidavit was signed by Ciara O'Gilvie. Ms. O'Gilvie did not testify at trial, and her affidavit was not admitted into evidence.

³ Lee was 14 months old at the time.

Mother and Father had always been problematic, that they “use drugs and have issues with domestic violence.” The Uncle’s girlfriend reportedly confirmed the truth of Grandmother’s account to the Department’s investigator.

On December 17, a Family Team Meeting took place with Mother, Father, Grandmother, and “CPS Staff”. The affidavit reports that at the meeting, “parents agreed to participate in a parental child safety placement” with Grandmother as the primary caregiver.

The affidavit states that as of December 21, Harris county jail confirmed both Mother and Father were incarcerated, and that on January 13, Mother was released from jail. At the time of the removal affidavit, January 24, 2020, the Department recommended that Lee be removed from Mother and Father’s custody and remain with Grandmother.

A hearing was held on May 5, 2020; both mother and father appeared through their respective attorneys of record. On May 13, 2020, an order was signed appointing the Department as Lee’s temporary managing conservator. The order included a warning in bold print that notified the parents that each action required in the order was necessary for return of the child and failure to comply could result in termination of parental rights. The order directed Mother and Father to comply with the Department’s service plan, which among other specifics, required Mother to do the following tasks:

1. Maintain a safe home for six months and maintain thereafter.
2. Maintain verifiable employment showing ongoing ability support herself and family and “provide the caseworker with her most recent pay stubs for verification of employment.”
3. Complete six-week in-class parenting classes (not including online courses) and target date for completion by February 29, 2020.
4. Attend all court hearings, visits, and permanency meetings.

5. Provide the agency with correct and accurate information regarding residency and services.
6. Provide “unadulterated random urine samples for drug testing as well as hair follicles.” The order notes “The department will consider any adulterated samples or no shows as positive drug test.”
7. Complete substance abuse assessment and follow all recommendations. The order notes “It is also recommended that she ... attend NA/AA meetings and find a sponsor” by February 29, 2020.
8. Complete Psychological Assessment and follow all recommendations by target date February 29, 2020.
9. Complete individual counseling and follow all recommendations by February 29, 2020.
10. Complete Domestic Violence for Victims and Perpetrator Course and follow all recommendations of the providers.

The Court held three permanency hearings prior to trial, (on November 12, 2020, June 3, 2021, and September 7, 2021), and at each hearing the court concluded that Mother had not demonstrated adequate and appropriate compliance with the service plan. Among other deficiencies, Mother’s tests were positive April of 2021 for alcohol and January of 2021 for marijuana, and Mother failed to attend any substance abuse services.

Trial

The three-day bench trial spanned across a five-month period, starting with day one on October 19, 2021, day two on December 13, 2021, and concluding day three on February 21, 2022. The Department’s caseworker, Celena Amador testified each of the three days, and on day three the child advocate, Althea Lacewell, and Mother also testified.

On day one, Amador explained that Lee had been placed in a foster home where her younger sister had been permanently placed and that they were doing well together. Amador testified that the two girls were bonded.

Amador testified Mother had completed her services under the plan except for weekly random drug tests. Although she was required to provide drug tests, she had only provided one test in September and had not yet provided a drug test for the month of October.

Despite having testified that Mother had completed her services (other than with respect to the drug test), Amador also testified that Mother was still working on providing consistent pay stubs or proof of employment and Amador noted she did not have her current information on this.

Amador testified that she had been unable to visit Mother despite efforts to connect with her. Mother cited contracting COVID as preventing the meeting at some point. As of the date of the hearing, Mother had not provided proof of the positive COVID test results.

Finally, Amador was asked about Lee's progress. She reported that Lee was seeing a play therapist every week (pursuant to the court's order), and that Lee's therapist had recommended that Mother not engage in therapy sessions, but that determination would be reconsidered once after the therapist develops a rapport with Lee and "handles the family dynamics with the child." Considering the possible future goal of family reunification, she discussed Lee's behavior when she mentioned to Lee a return to home with Mother: "She looked -- she was happy and she was playful before we asked any question like that, so when we did ask a question like that, she immediately looked angry and she looked like she was in a trance."

Trial recessed on October 19.

On day two of trial, Amador's testimony continued, and she began by answering questions about how Lee came into the Department's care. Amador

testified that Lee was exposed to domestic violence and came into the care of the Department based on allegations that Mother had put a loaded gun to her own mother's head.

Amador testified that Mother had not visited with Lee in a year and half, that it was court ordered in August 2020 for visits to be suspended, and suspended because of concerns she, the attorney ad litem and the judge had regarding the child's behaviors after visits with her mom.

Amador stated that Mother was about 80 percent complete on her service plan. She noted she had still had not completed her substance abuse services, because the service provider was pending on a random urine analysis which had not yet submitted. Amador confirmed that Mother was required to complete one more urine analysis test before she got discharged and her attorney had been advised of that. She noted that Mother had previously been compliant, but indicated there had been no progress in this regard since day one of trial, and that the last time the mother submitted to a drug test was on September 20, 2021.

Amador testified that Mother had been saying she had COVID since September 21, 2021 but her test result on November 5 was negative, and Mother reported that she had not gone to the hospital for COVID treatment.

Amador explained that under the Department's policy, Mother essentially tested positive for drugs because under policy if a person is ordered or referred for a drug test and fails to go that is what that means. Amador also admitted that Mother had failed to complete (or even enroll in) substance abuse services, in violation of the plan. Amador also admitted Mother had failed to follow up with recommendations regarding her psych assessment, and essentially avoided treatment of a possible mental illness.

Amador also reported that upon visiting Mother in November, Mother reported that Father had come to her home unannounced and attacked her. Amador noted that Mother had bruises and marks evidencing that Father bit Mother in the attack. Mother told Amador that she was trying to call the police to report the incident. Mother had denied telling Father where she had lived and did not know how he had located her. Amador further testified that during her visit that there did not “seem to be any food in the home for the children in the event the children were returned home.”

When trial resumed on day three, Amador was asked again about Mother’s performance under the family service plan. Amador acknowledged Mother tested positive for marijuana but not any other substance. Amador testified that Mother had been discharged unsuccessfully from the substance abuse provider.

Amador noted that as a result of the November attack, Mother had obtained an order preventing Father from coming around her.

Amador stated she saw Exhibit 4 concerning Mother’s mental state and agreed her mental instability causes potential harm to the child if the child stays with her.

Amador confirmed Lee has been in her foster home for ten months and was doing well, and physically safe; her needs, physical and bonding, were provided at that home. She stated the child’s caregiver wants to adopt Lee and offer guidance and supervision consistent with the children’s safety. Amador testified about her visits with the foster parents:

The child willingly will give her hugs throughout the visit, like while we’re talking to the caregiver, she will randomly come up to the caregiver and give her a hug. I’ve heard the child say that she’s the best, like to her -- the mom -- or the foster mom. She’s very excited, very happy. This is actually the happiest I’ve ever seen the child in

any of her placements. Just -- I can tell from her behaviors and it seems as though her -- she's really just opened up a lot more.

The child advocate, Althea Lacewell, testified on the third day and reported her assessment based on her visitations with Lee and with Mother. Lacewell noted concerns about Lee's behavior when visiting with Mother, but noted that Lee's behaviors improved drastically when placed in her third placement. She stated "[Lee] is pleasant, she's not bedwetting anymore, she's friendly. Her behavior has changed drastically since I've been on this case, and I'm happy to see that she's doing so well."

Lacewell also testified about her discussions with Mother, and noted concern about Mother's failure to complete the substance abuse services and recommendations from the psychological assessment that stated she needed to be evaluated for inpatient substance abuse treatment if she failed to complete substance abuse timely.

Mother testified that she had recent issues with drug testing because she was in a car accident in June and it stopped her from doing things. Mother acknowledged the hair follicle indicated there was marijuana usage in the past several months. Mother stated she was using CBD products and she was aware that can cause results that indicate marijuana usage. She admitted was not referred by her doctor and that it would have been important to talk to a doctor because there was a pending case with drug abuse allegations.

Mother acknowledged she engaged in a violent contact with the child's father, but stated a charge against her for assaulting him in 2017 or 2018 was dismissed. Mother stated that in the majority of cases where she was charged with assault against a family member those people came and asked the prosecutor to drop the charges. Mother admitted she was not denying that she had violent

behavior against family members.

Termination Order

At the conclusion of the bench trial, Mother's parental rights were terminated in accordance with Texas Family Code §161.001(b)(1)(D), (E), (O) and (P), and the court further found that such was in the child's best interest.

II. ISSUES AND ANALYSIS

A court may terminate the parent-child relationship if the court finds by clear and convincing evidence that (1) the parent has engaged in at least one statutory predicate act and (2) termination is in the best interest of the child. *See In re N.G.*, 577 S.W.3d 230 (Tex. 2019); *In re L.C.L.*, 599 S.W.3d 79, 83 (Tex. App.—Houston [14th Dist.] 2020) (en banc), *pet denied*, 629 S.W.3d 909 (Tex. 2021); *see also* Tex. Fam. Code § 161.001(b).

Mother raises six issues. In her first four issues, Mother challenges the legal and factual sufficiency supporting the court's predicate-ground findings under subsections D, E, O, and P, respectively. Tex. Fam. Code Ann. § 161.001(b). In her fifth issue, Mother challenges the factual sufficiency of the evidence to support the trial court's finding that termination of her parental rights is in the best interest of the child. Tex. Fam. Code Ann. § 161.001(b)(2). In her sixth issue, she challenges the court's appointment of the Department as sole managing conservator of Lee.

A. Standard of Review

Termination of the parent-child relationship is a drastic remedy and is of such weight and gravity that due process requires the state to justify termination by clear and convincing evidence. *In re C.H.*, 89 S.W.3d 17, 23 (Tex. 2002); *see also In re L.G.R.*, 498 S.W.3d 195, 201 (Tex. App.—Houston [14th Dist.] 2016, *pet.*

denied). 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 § 101.007. This heightened burden of proof results in a heightened standard of review when evaluating the sufficiency of the evidence. *In re L.G.R.*, 498 S.W.3d at 202.

Under a legal sufficiency review, we look at all the evidence in the light most favorable to the finding to determine whether a reasonable factfinder could have formed a firm belief or conviction that the finding was true. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). We assume the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. *Id.* We disregard all evidence that a reasonable factfinder could have disbelieved or found to have been not credible, but we do not disregard undisputed facts. *See In re Commitment of Stoddard*, 619 S.W.3d 665, 674 (Tex. 2020).

Evidence is factually insufficient if, in light of the entire record, “the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction.” *In re J.F.C.*, 96 S.W.3d at 266.

B. Is the trial court’s order terminating Mother’s parental rights supported by legally and factually sufficient evidence to support termination of parental rights under 161.001(b)(1)(D) or (E)?

Termination of parental rights is warranted if the factfinder finds by clear and convincing evidence, in addition to the best-interest finding, that the parent has “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 “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.” Tex.

Fam. Code § 161.001(b)(1)(D), (E). “To endanger” means to expose a child to loss or injury or to jeopardize a child’s emotional or physical health. *In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996).

1. *Endangerment by Environment.*

By making a finding under subsection (D), the court concluded that Mother knowingly placed or knowingly allowed Lee to remain in conditions or surroundings which endangered Lee’s physical or emotional well-being. See Tex. Fam. Code § 161.001(b)(1)(D). Inappropriate, abusive, or unlawful conduct by a parent or other persons who live in the home can create an environment that endangers the physical or emotional wellbeing of a child. *In re L.E.R.*, 2022 WL 1088592, at *9; *Interest of K.J.B.*, No. 14-19-00473-CV, 2019 WL 5704317, at *7 (Tex. App.—Houston [14th Dist.] Nov. 5, 2019, pet. denied). A single act or omission may be sufficient to support termination under subsection (D). *Interest of K.J.B.*, 2022 WL 1088592, at *9. In evaluating endangerment under subsection (D), the court must consider the child’s environment *before* the Department obtained custody. *In re L.E.R.*, 2022 WL 1088592, at *9. Subsection (D) is not a basis for termination of parental rights if the parent was unaware of the endangering environment. *In re V.A.*, 598 S.W.3d 317, 329 (Tex. App.—Houston [14th Dist.] 2020, pet. denied). There must be clear and convincing evidence of endangerment as well as of the parent’s awareness of the endangering environment. *Id.* Although the parent need not have certain knowledge that an actual injury is occurring, the parent must at least be aware of the potential for danger to the child in such an environment and must have disregarded that risk. *In re A.S.*, 261 S.W.3d 76, 83 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

The record shows the trial court was supplied uncontroverted proof that Mother knowingly kept Lee in, and created, an endangering environment based on

evidence that Mother committed acts of domestic violence against Father and Grandmother.

Mother suggests that the only relevant criminal activity pertinent to the analysis would be the charge for aggravated assault upon which removal was based-- the incident where Grandmother alleged that Mother pointed a loaded gun at her head. She discounts the incident since Grandmother refused to testify against her. Mother contends that the existence of a bow and arrow discovered by the caseworker at a home visit in November 2021 after the Department had taken possession of Lee is the only evidence of endangering conditions at her home.

We are not concerned with the existence of the bow and arrow discovered in Mother's home, a home she had not occupied until after the date of removal. Rather we are concerned with evidence supporting endangerment up to the date of removal, which includes uncontested evidence of Mother's acts upon which criminal charges in 2019 were based. Specifically, the Department offered an affidavit that showed on August 26, 2019, Mother challenged Father to a physical altercation and struck him in the face causing a busted lip, laceration to his elbow and knot on his forehead. Father reported to police that was not the first time Mother had assaulted him and that they had an extended history with the Baytown Police Department.⁴ Additionally, Amador testified that on December 14, 2019, when Lee was 14 months old, she "was exposed to domestic violence," when "[Mother] had an altercation with [Grandmother] in front of the child." Amador explained that the removal was based on this altercation, described in the removal affidavit, which stated that Mother put "a gun up to her mom's head." Had the evidence been significantly challenged with controverting testimony, our view may

⁴ We note that in response to questioning about an exhibit reflecting the August 2019 charge, Amador testified that it had been dismissed, but only because it was a duplicate charge.

be different, but Mother admitted she engaged in violent contact with Father, and failed to dispute the validity of the facts supporting the criminal charges. *See In re C.L.E.E.G.*, 639 S.W.3d 696, 699 (Tex. 2022) (as sole arbiter when assessing credibility and demeanor of witnesses, a trier of fact is free to disregard a parent's testimony especially when it is merely conjecture).

When viewed in the light most favorable to the trial court's findings, the record evidence is legally sufficient to support the trial court's determination that termination of Father's parental rights was justified under section 161.001(b)(1)(D) of the Family Code. *See In re J.O.A.*, 283 S.W.3d at 344. Further, in view of the entire record, we conclude the disputed evidence is not so significant as to prevent the trial court from forming a firm belief or conviction that termination was warranted under section 161.001(b)(1)(D). *See id.* at 345. The evidence therefore was factually sufficient to support the trial court's section 161.001(b)(1)(D) findings. *See id.*

We overrule Mother's first issue.

2. Endangerment by Conduct.

By making the subsection (E) finding, the judge determined that Mother had engaged in conduct or knowingly placed Lee with persons who engaged in conduct that endangered Lee's physical or emotional well-being. Tex. Fam. Code Ann. § 161.001(b)(1)(E). A finding of endangerment under subsection (E) requires evidence that the endangerment resulted from the parent's conduct, including acts, omissions, or failures to act. *In re S.R.*, 452 S.W.3d at 361. Unlike subsection (D), termination of the parent-child relationship under subsection (E) must be based on more than a single act or omission; the statute requires a voluntary, deliberate, and conscious course of conduct by the parent. *Id.* A court properly may consider actions and inactions occurring both before and after a child's birth to establish a

course of conduct. *In re A.L.H.*, 515 S.W.3d 60, 91 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

In this case, the evidence discussed as relevant to subsection (D)—Mother’s acts of family violence—is also relevant to our analysis of whether Mother engaged in conduct that endangered the physical or emotional wellbeing of Lee under subsection E.); *In re A.A.C.*, No. 14-19-00560-CV, 2019 WL 6913327, at *6 (Tex. App.—Houston [14th Dist.] Dec. 19, 2019, no pet.) (mem. op.) (explaining that evidence of criminal conduct, convictions, imprisonment, and their effects on a parent’s life and ability to parent, and routinely subjecting children to the probability that they will be left without their parent endangers children’s physical and emotional wellbeing is sufficient to support a subsection (E) finding).

Mother downplays evidence of her one 2018 conviction, the two family-member assault charges that she contends were dismissed, and three other pending charges. She contends that “it would be rank speculation at this time to conclude” that such offenses are relevant to show she is a danger to her daughter. Mother contends, contrary to the image of an aggressor suggested by the criminal charges, that she is the victim. And in this regard Mother draws attention to the November 2021 incident where Father came to her home and hit her and bit her. Mother denied having continued contact with Father and explained that Father came unannounced. She points to the fact that she obtained a protective order against Lee’s father as probative of her efforts to protect Lee from endangerment.

However, the record establishes a voluntary, deliberate, and conscious course of conduct by Mother that endangered the Lee’s emotional and physical well-being.

The evidence before the trial court shows that Mother’s conviction, along the criminal charges that were dismissed and those pending charges, were not the

only evidence of Mother's aggressive behavior. Mother admitted that she engaged in violent conduct with her family members. Amador testified that service providers had issues with Mother's aggressive behaviors. Testimony of the Department's caseworker and Mother's own testimony presented facts establishing Mother's history of engaging in violent and abusive conduct toward her family members, both before and after the Department obtained custody of Lee. *See Interest of M.M.M.*, No. 01-21-00269-CV, 2021 WL 5365102, at *10 (Tex. App.—Houston [1st Dist.] Nov. 18, 2021, pet. denied); *See In re J.L.M.*, No. 01-16-00445-CV, 2016 WL 6754779, *8 (Tex. App.—Houston [1st Dist.] Nov. 15, 2016, no pet.) (mem. op.) (considering evidence of mother's hostility towards others during the case as evidence supporting endangerment finding). Moreover, the trial court was provided evidence that at least some of Mother's violent conduct was carried out in Lee's presence.

Mother tested positive for marijuana in January 2021, and admitted to a case worker around December 2019 that she was doing drugs. On appeal, Mother suggest that the Department lacked proof of *illegal* drug use based on her testimony that she used CBD products and she understood use of CBD could cause results indicating marijuana usage. Mother admitted that she was never prescribed use of CBD oil and knew it would have been important to talk to her doctor considering she had a pending case where such usage would be relevant. Mother also failed to appear for regular drug testing, which permitted the court to infer Mother was using illegal drugs. *See In re E.R.W.*, 528 S.W.3d 251, 265 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Although on appeal she contends that her testimony regarding the challenges to appear for visits (an injury and no reliable source of transportation) could have contributed to her missed drug tests, she confirmed that she was going to therapy three times a week for car-accident-

related injuries. The trial judge was free to conclude that Mother had engaged in endangering conduct by illegal drug use while the case was pending, and otherwise engaged in behavior that could have led to her incarceration. *See In re V.L.F.*, No. 14-18-00588-CV, 2018 WL 6614168 *10 (Tex. App. – Houston [14th Dist.] 2018, no pet.) (“Illegal drug use creates the possibility that the parent will be impaired or imprisoned and thus incapable of parenting ... Drug use and the imprisonments relating to it harm the physical and emotional well-being of a child.”); *In re L.M.R.*, No. 14-17-00597-CV, 2018 WL 285121 *6 (Tex. App. – Houston [14th Dist.] 2018, pet. denied) (mem. op.) (“[c]ontinued illegal drug use after a child’s removal jeopardies parental rights and may demonstrate an endangering course of conduct.”). The trial court was provided material facts that supported the fact finder’s firm belief or conviction that Mother would have known her conduct jeopardized reunification.

When viewed in the light most favorable to the trial court’s findings, the record evidence is legally sufficient to support the trial court’s determination that termination of Mother’s parental rights was justified under section 161.001(b)(1)(E) of the Family Code. *See In re J.O.A.*, 283 S.W.3d at 344 (failed drug test during pending case); *Interest of M.M.M.*, 2021 WL 5365102, at *10 (aggressive behaviors); *A.A.C.*, No. 14-19-00560-CV, 2019 WL 6913327, at *6 (Tex. App.—Houston [14th Dist.] Dec. 19, 2019, no pet.) (mem. op.) (criminal conduct, convictions, imprisonment). Further, in view of the entire record, we conclude the disputed evidence is not so significant as to prevent the trial court from forming a firm belief or conviction that termination was warranted under section subsection (E). *See id.* at 345. The evidence therefore was factually sufficient to support the trial court’s section 161.001(b)(1)(E) findings. *See id.* We overrule Mother’s challenges to those findings.

We overrule Mother's second issue.

Having concluded the evidence is legally and factually sufficient to support the trial court's endangerment findings, we need not review the sufficiency of the evidence to support the subsection (O) and (P) findings. See *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003).

C. Is the trial court's order terminating Mother's parental rights supported by factually sufficient evidence to support the trial court's finding that termination is the best interest of child?

Mother's fifth issue challenges the trial court's best-interest finding to support termination - she contends the evidence is legally and factually insufficient to support that finding.

There is a strong presumption that the best interest of the child is served by keeping the child with her natural parents. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam) (citing Tex. Fam. Code Ann. § 153.131(b)); *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.). However, prompt and permanent placement of the child in a safe environment is also presumed to be in the child's best interest. *In re S.R.*, 452 S.W.3d at 366 (citing Tex. Fam. Code Ann. § 263.307(a)). Proof of acts or omissions under section 161.001(b)(1) is probative of the issue of the child's best interest. *See id.* The considerations that the factfinder may use to determine the best interest of the child, known as the *Holley* factors, include:

- (1) the desires of the child;
- (2) the present and future physical and emotional needs of the child;
- (3) the present and future physical and emotional danger to the child;
- (4) the parental abilities of the person seeking custody;
- (5) the programs available to assist the person seeking custody in promoting the best interest of the children;

- (6) the plans for the child by the individuals or agency seeking custody;
- (7) the stability of the home or proposed placement;
- (8) acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate; and
- (9) any excuse for the parent's acts or omissions.

See Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976) (interpreting former Tex. Fam. Code § 15.02 (since amended)); see also Tex. Fam. Code Ann. § 263.307(b) (listing factors to be considered in evaluating “whether the child’s parents are willing and able to provide the child with a safe environment”).

Section 263.307 factors relevant to our evaluation in this case include: the evidence concerning the subject child’s age and physical and mental health vulnerabilities, the history of substance abuse, evidence regarding the parent’s willingness to seek counseling services, and cooperate under the agency’s close supervision; the evidence related to the parent’s willingness and ability to effect positive environmental and personal changes within a reasonable period of time and evidence concerning whether the parent demonstrates adequate parenting skills, including providing minimally adequate health care, supervision, a safe physical home environment and understanding of her child’s needs and capabilities. Tex. Fam. Code § 263.307(b)(1), (8), (10), (11) and (12). A best-interest finding does not require proof of any unique set of factors or limit proof to any specific factors. *See Holley*, 544 S.W.2d at 371–72.

Desires of the Child

Lee was a one-year old when she was removed from Mother’s care and placed with the Department, and accordingly did not testify. However, the Department contends that there was some evidence that she had indicated a desire to stay with her current foster family. Amador described multiple events where

Lee's emotions took an unfavorable turn (with respect to Mother) at the mention of Mother. In her last description, Amador testified that Lee was asked if she wanted to go back to her mommy, and explained that she looked sad but brightened when she saw her foster mom and stated, "But that's my Mommy," and indicated that she wanted to stay with her.

Even if the judge discounted these expressions in light of the child's age, the judge was free to consider other evidence that weighed in favor of termination – that Lee has bonded with the foster family, is well cared for by the foster family, and has spent minimal time with Mother. *In re L.G.R.*, 498 S.W.3d 195, 205 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

On the balance, the first *Holly* factor favors termination.

The child's emotional and physical needs now and in the future

A fact finder may infer from a parent's past inability to meet the child's physical and emotional needs that the parent is unable or unwilling to meet the child's needs in the future. *See In re J.D.*, 436 S.W.3d 105, 118 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Evidence of a parent's unstable lifestyle can support a factfinder's conclusion that termination of parental rights is in the child's best interest. *In re S.B.*, 207 S.W.3d 877, 887 (Tex. App.—Fort Worth 2006, no pet.). Lack of stability, including a stable home, supports a finding that the parent is unable to provide for a child's emotional and physical needs. *See In re G.M.G.*, 444 S.W.3d 46, 59–60 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *see also Doyle v. Tex. Dep't of Protective & Regulatory Servs.*, 16 S.W.3d 390, 398 (Tex. App.—El Paso 2000, pet. denied) (parent's failure to provide stable home and provide for child's needs may contribute to finding that termination of parental rights is in child's best interest).

In Amador's description of observations from her November 2021 visit with Mother, she explained that she found Mother beaten and bruised, archer's weapons on the wall, and no evidence of food.

According to Lacewell, she had concerns for Lee's well-being when she was placed by the Department with relatives, but noted dramatic improvement after Lee was placed with non-family foster parents and when visitations with Mother were cancelled at the direction of her therapist. Amador testified that Lee's foster parents were ready and willing to take care of Lee long term, and very interested in adopting both Lee and her sibling.

In light of these considerations, we conclude that evidence implicating the second factor shows that termination of Mother's parental rights support the court's best-interest finding.

The present and future emotional and physical danger to the child

A factfinder may infer from the parent's past conduct endangering the child's well-being that similar conduct will recur in the future. *See Interest of E.C.S.*, No. 14-19-00039-CV, 2019 WL 2589943, at *7, *8 (Tex. App.—Houston [14th Dist.] June 25, 2019, no pet.) (mem. op.); *Interest of D.M.M.*, No. 14-18-00750-CV, 2019 WL 546029, at *14 (Tex. App.—Houston [14th Dist.] Feb. 12, 2019, pet. denied) (mem. op.). Lee was originally removed after an incident involving family violence. Ample evidence showed Mother was both a victim and aggressor of family violence in the past. Even while trial was pending Mother could not extricate herself from the pattern. Even assuming Mother was entirely innocent in that event, as Lacewell explained, despite the fact that Father's surprise attack visit that left Mother battered, Mother was so resistant to pressing charges against father, that it took "everyone on this case" to convince Mother otherwise.

A parent's substance abuse supports a finding that termination is in the best interest of the child. *In re E.R.W.*, 528 S.W.3d at 266. The fact finder can give "great weight" to the "significant factor" of drug-related conduct. *Id.*; *see also Interest of Z.H.*, 14-19-00061-CV, 2019 WL 2632015, at *6 (Tex. App.—Houston [14th Dist.] June 27, 2019, no pet.)(considering parents' drug use in the context of evaluating the present and future emotional and physical danger to the child).

Because the record contains evidence showing the possibility that Mother would continue to engage in family violence, and that Mother's drug problem would persist and thus present a future emotional danger to Lee, the third *Holley* factor supports the factfinder's best-interest finding.

The plans for the child by the individuals or agency seeking custody

Placement plans and adoption are relevant but "the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor." *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002). The issue is "whether, on the entire record, a factfinder could reasonably form a firm conviction or belief that termination of the parent's rights would be in the child's best interest even if the agency is unable to identify with precision the child's future home environment." *Id.*

In her third placement, Lee was placed in a foster home where she was joined her sister. Amador and Lacewell testified that Lee had faired the best in this home. Very little testimony was provided about Lee's foster parents, however, the caseworker testified that Lee was happy in her current foster home and that the caregiver had provided for Lee's needs. Mother had not demonstrated any specific plans to provide for Lee's needs.

This factor slightly favors a finding that terminating Mother's parental rights

is in the best interest of the child.

The Acts or Omissions of the Parents, and any Excuses

Evidence supporting termination under the grounds listed in section 161.001(b)(1) also can be considered in support of a finding that termination is in the child's best interest. *See C.H.*, 89 S.W.3d at 27 (holding the same evidence may be probative of both section 161.001(b)(1) grounds and best interest). Specifically, here, in addition to acts pertinent to court's endangerment-findings, the trial court could properly consider that Mother did not comply with the court-ordered service plan for reunification with the child and Mother's excuses for non-compliance. *See In re E.C.R.*, 402 S.W.3d 239, 249 (Tex. 2013).

The eighth *Holley* factor favors the determination that termination of Mother's parental rights would be in the child's best interest, and at best, the ninth *Holley* factor is neutral.

Concluding Analysis of Holley factors

Applying the applicable *Holley* factors to the evidence, we conclude that legally and factually sufficient evidence supports the trial court's finding that termination of Mother's parental rights is in Lee's best interests. Based on the evidence presented, the trial court reasonably could have formed a firm belief or conviction that terminating Mother's rights served Lee's best interests so that she quickly could achieve permanency through adoption.

Accordingly, we overrule Mother's fifth issue.

D. Did the trial court abuse its discretion appointing the Department as Lee's sole managing conservator?

In her sixth issue, Mother challenges the trial court's appointment of the Department as Lee's sole managing conservator.

A trial court’s conservatorship decision is subject to review for an abuse of discretion and may be reversed only if the decision is arbitrary and unreasonable. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). We consider whether the trial court had sufficient information upon which to exercise its discretion and whether the trial court erred in the application of its discretion. *In re P.N.T.*, 580 S.W.3d 331, 360 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).

The thrust of Mother’s complaint is based on her contention that the Department failed to offer evidence showing Mother would cause Lee harm. In the preceding sections, we explained that the record does not support this view.

Under section 161.207 of the Family Code, the Department is statutorily identified as an eligible managing conservator. Tex. Fam. Code § 161.207. This operated as the controlling authority supporting the court’s decision to appoint the Department as sole managing conservator. *See In re M.P.*, 618 S.W.3d 88, 109 (Tex. App. – Houston [14th Dist.] 2020, pet. denied); *In re E.R.*, 555 S.W.3d 796, 811 (Tex. App. –Houston [14th Dist.] 2018, pet. denied). We cannot conclude that the trial court abused its discretion when it appointed the Department as sole managing conservator; that decision was neither arbitrary nor unreasonable.

Mother’s sixth issue is overruled.

III. CONCLUSION

Having overruled the issues that Mother has raised necessary to the disposition of her appeal, we affirm the trial court’s judgment.

/s/ Randy Wilson
Justice

Justice Bourliot, Justice Hassan and Justice Wilson