



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-16-00445-CV

**IN THE INTEREST OF A.C.Y., and A.T.Y., Children**

From the 45th Judicial District Court, Bexar County, Texas  
Trial Court No. 2015PA01040  
Judge Timothy Johnson, Judge Presiding<sup>1</sup>

Opinion by: Marialyn Barnard, Justice

Sitting: Marialyn Barnard, Justice  
Patricia O. Alvarez, Justice  
Luz Elena D. Chapa, Justice

Delivered and Filed: October 26, 2016

**AFFIRMED**

This is an appeal from a trial court's order terminating appellant mother's ("Mother") rights to two of her five children, A.C.Y., and A.T.Y.<sup>2</sup> On appeal, Mother contends the evidence is legally and factually insufficient to support the trial court's finding that termination was in the best interests of the children. We affirm the trial court's judgment.

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<sup>1</sup> The Honorable Stephani Walsh is the presiding judge of the 45th Judicial District Court, Bexar County, Texas. However, the Honorable Timothy Johnson, retired, signed the termination order and was sitting by assignment.

<sup>2</sup> The Texas Department of Family and Protective Services ("the Department") also sought termination of Mother's rights to her three oldest children, A.N.Y., A.A.S. III, and A.A.S. However, at the conclusion of the final hearing, the trial court determined termination was not in the best interests of these children. As to these children, the trial court appointed the Department as managing conservator and Mother as possessory conservator. In her brief, Mother states she is not appealing these appointments; rather, she is appealing only the termination of her rights as to her two youngest children.

## BACKGROUND

The record shows the Texas Department of Family and Protective Services (“the Department”) became involved with Mother and her five children in April 2015. At that time, the Department received a referral alleging drug use by Mother, homelessness, and neglectful supervision of the children. Mother and the children were found at a motel. The children were removed and placed in a cousin’s home. At the time of removal, the children ranged in age from fourteen-years-old to one-year-old.<sup>3</sup> The children that are the subject of this appeal, A.C.Y. and A.T.Y., were, respectively, seven-years-old and one-year-old at the time of removal.

After the initial placement and several other temporary placements became untenable — due to Mother’s behavior toward those providing the placements — the Department filed its original petition, seeking termination of Mother’s parental rights in the event reunification was impossible.<sup>4</sup> In addition, the Department sought and received an emergency order of protection, pursuant to which the Department was named temporary sole managing conservator of the children.

The Department prepared a service plan for Mother with a stated goal of reunification. The trial court held the statutorily-required status and permanency hearings. Ultimately, the Department moved to terminate Mother’s parental rights. After a final hearing, at which Mother appeared with counsel, the trial court determined her parental rights should be terminated as to A.C.Y. and A.T.Y, the two youngest children. The trial court found Mother: (1) knowingly placed

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<sup>3</sup> In our review of the testimony, the ages provided for the children are based on their ages at the time of trial unless otherwise indicated.

<sup>4</sup> The petition also sought termination of the three fathers’ rights as well. The trial court terminated the parental rights of the father of A.A.S. III and A.A.S., as well as the rights of the father of A.C.Y. As to the oldest and youngest children, who share a father, the trial court terminated his rights as to the youngest child, A.T.Y., but not as to the oldest child, A.N.Y. As to the oldest child, the father and Mother were appointed possessory conservators, with the Department acting as managing conservator. None of the fathers filed a notice of appeal challenging the trial court’s order. Accordingly, they are not parties to this appeal.

the children or allowed the children to remain in conditions that endangered their physical or emotional well-being; (2) engaged in conduct or knowingly placed the children with someone who engaged in conduct that endangered their physical or emotional well-being; (3) failed to comply with the provisions of a court order that established the actions necessary for her to obtain the return of the children; and (4) used a controlled substance in a manner that endangered the health or safety of the children and (a) failed to complete a court-ordered substance abuse program, or (b) after completion of such program, continued to abuse a controlled substance. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (O), (P) (West Supp. 2016). The trial court further found termination of Mother's parental rights would be in the children's best interests. *See id.* § 161.001(b)(2). Accordingly, the trial court rendered an order terminating Mother's parental rights as to her two youngest children. As to the three oldest children, the trial court determined that at the time of the final hearing, it would not be in their best interests to terminate Mother's parental rights. Rather, the court named the Department managing conservator and Mother possessory conservator of the three oldest children. Thereafter, Mother perfected this appeal, challenging only the termination of her parental rights as to A.C.Y. and A.T.Y.

#### **ANALYSIS**

On appeal, Mother does not challenge the evidence with regard to the trial court's findings under section 161.001(b)(1) of the Texas Family Code ("the Code"). *See id.* § 161.001(b)(1)(D), (E), (O), (P). Rather, Mother contends the evidence is legally and factually insufficient to support the trial court's finding that termination was in the best interests of A.C.Y. and A.T.Y. *See id.* § 161.001(b)(2).

#### ***Standard of Review***

The Code provides that a parent's right to her children may be terminated upon proof by clear and convincing evidence that: (1) the parent committed an act prohibited by section

161.001(b)(1) of the Code; and (2) termination is in the best interest of the child. *Id.* § 161.001(b)(1), (2); *In re J.O.A.*, 283 S.W.3d 336, 344 (Tex. 2009); *In re B.R.*, 456 S.W.3d 612, 615 (Tex. App.—San Antonio 2015, no pet.). The Code defines “clear and convincing evidence” as “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 (West 2008); *see J.O.A.*, 283 S.W.3d at 344; *B.R.*, 456 S.W.3d at 615. Termination of parental rights results in permanent and unalterable changes for both parent and child. *In re E.A.G.*, 373 S.W.3d 129, 140 (Tex. App.—San Antonio 2012, pet. denied). Accordingly, we have held due process is implicated, requiring that we use the heightened clear and convincing standard of review. *Id.* Given the foregoing, we must determine whether the evidence is such that a fact finder could reasonably form a firm belief or conviction that termination was in the children’s best interests. *In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (citing *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002)).

In reviewing a legal sufficiency challenge in termination cases, we view the evidence in the light most favorable to the trial court’s finding and judgment, and resolve any disputed facts in favor of the trial court’s findings if a reasonable fact finder could have so resolved them. *Id.* We must disregard all evidence that a reasonable fact finder could have disbelieved and consider undisputed evidence even if such evidence is contrary to the trial court’s findings. *Id.* In other words, we consider evidence favorable to termination if a reasonable fact finder could and disregard contrary evidence unless a reasonable fact finder could not. *Id.*

In a factual sufficiency review, we still give due deference to the trier of fact’s findings, avoiding substituting our judgment for that of the fact finder. *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). “If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not

reasonably have formed a firm belief or conviction [in the truth of its finding], then the evidence is factually insufficient.” *Id.* (quoting *J.F.C.*, 96 S.W.3d at 266).

When conducting a sufficiency review, we may not weigh a witness’s credibility — as it depends on appearance and demeanor; these are within the domain of the trier of fact. *J.P.B.*, 180 S.W.3d at 573. Even if evidence regarding appearance and demeanor are found in the appellate record, we must nevertheless defer to the fact finder’s reasonable resolutions. *Id.*

### ***Applicable Law***

The Texas Supreme Court has set forth factors a court may consider when making a best interest determination. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). The factors include: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child; (6) the plans for the child by these individuals or by the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Id.* However, these considerations, which are commonly referred to as “the *Holley* factors,” are not the only factors a court may consider. *See In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002). Moreover, a court need not find evidence of each and every factor before terminating the parent-child relationship. *See id.* As stated in *C.H.*, “The absence of evidence about some of these considerations would not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child’s best interest, particularly if the evidence were undisputed that the parental relationship endangered the safety of the child.” *Id.* And, as this court has recognized, in conducting our review of a trial

court's best interest determination, we focus not on the best interest of the parent, but on the best interest of the child. *In re D.M.*, 452 S.W.3d 462, 470 (Tex. App.—San Antonio 2014, no pet.).

We also note that although proof of acts or omissions under section 161.001(b)(1) of the Texas Family Code does not relieve the Department from proving the best interest prong, the same evidence may be probative of both issues. *C.H.*, 89 S.W.3d at 28 (citing *Holley*, 544 S.W.2d at 370; *Wiley v. Spratlan*, 543 S.W.2d 349, 351 (Tex. 1976)); *B.R.*, 456 S.W.3d at 615. In conducting a best interest analysis, courts may consider circumstantial evidence, subjective factors, and the totality of the evidence, in addition to direct evidence. *B.R.*, 456 S.W.3d at 616 (citing *In re E.D.*, 419 S.W.3d 615, 620 (Tex. App.—San Antonio 2013, pet. denied)). Additionally, a fact finder may judge a parent's future conduct by his or her past conduct in determining whether termination of the parent-child relationship is in the best interest of the child. *Id.*

There is a strong presumption that maintaining the parent-child relationship is in a child's best interest. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). However, we also presume that permanently placing a child in a safe environment in a timely manner is in the child's best interest. *B.R.*, 456 S.W.3d at 615; *see* TEX. FAM. CODE ANN. § 263.307(a) (West Supp. 2015). In determining whether a parent is willing and able to provide the child with a safe environment, courts should consider the factors set out in section 263.307(b) of the Code, which include: (1) the child's age and physical and mental vulnerabilities; (2) the frequency and nature of out-of-home placements; (3) the magnitude, frequency, and circumstances of the harm to the child; (4) whether the child has been the victim of repeated harm after the initial report and intervention by the Department or other agency; (5) whether the child is fearful of living in, or returning to, the child's home; (6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home; (7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access

to the child's home; (8) whether there is a history of substance abuse by the child's family or others who have access to the child's home; (9) whether the perpetrator of the harm to the child is identified; (10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision; (11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time; (12) whether the child's family demonstrates adequate parenting skills; and (13) whether an adequate social support system consisting of an extended family and friends is available to the child. TEX. FAM. CODE ANN. § 263.307(b); *see In re G.C.D.*, No. 04-14-00769-CV, 2015 WL 1938435, at \*4 (Tex. App.—San Antonio Apr. 29, 2015, no pet.) (mem. op.) (citing *In re A.S.*, No. 04-14-00505-CV, 2014 WL 5839256, at \*2 (Tex. App.—San Antonio Nov. 12, 2014, pet. denied) (mem. op.)); *B.R.*, 456 S.W.3d at 615.

### ***The Evidence***

In reviewing the evidence in this case, we have considered the *Holley* factors and the statutory factors in section 263.307(b) of the Code. *See* TEX. FAM. CODE ANN. § 263.307(b); *Holley*, 544 S.W.2d at 371–72. We have also considered the acts or omissions as found by the trial court under section 161.001(b)(1) of the Code, as well as the circumstantial evidence, subjective factors, and the totality of the evidence. *See In re R.S.D.*, 446 S.W.3d 816, 820 (Tex. App.—San Antonio 2014, no pet.).

At the final hearing, the Department called five witnesses: (1) Lily Alcorta, a Department investigative caseworker; (2) Valencia Wright, a Department investigative caseworker; (3) Mother; (4) N.M., who at the time of trial was caring for eight-year-old A.C.Y. and two-year-old A.T.Y.; and (5) the father of A.N.Y. and A.T.Y.<sup>5</sup> The attorney ad litem for the children called the

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<sup>5</sup> We need not set out or review his testimony as he has not appealed the termination of his rights as to A.T.Y., nor the naming of the Department as managing conservator as to A.N.Y. When he testified, he provided no evidence relative

oldest child, A.N.Y. According to the ad litem, A.N.Y. asked to testify. The Department suggested A.N.Y. speak with the trial court in chambers, but the trial court decided that because A.N.Y. desired to testify, she would testify in open court.

*1. Lily Alcorta — Department Caseworker*

The Department first called Lily Alcorta to the stand. Ms. Alcorta, who was an investigative caseworker for the Department at the time the children were removed, testified that in April 2015, the Department received a referral concerning A.N.Y., A.A.S III, A.A.S., A.C.Y., and A.T.Y. The caller alleged Mother was using drugs and was failing to supervise the children. The caller also alleged the family was homeless. According to Ms. Alcorta, it took her “a while” to find Mother, first going to a few addresses the Department had on file without luck. Ultimately, the family was found at a motel in downtown San Antonio by a Department “night unit.” When they were first located, the children were immediately removed and placed with a relative. However, Mother showed up in the middle of the night and took the two youngest children to a friend’s house. Mother insisted all of the children be placed elsewhere. After some discussion, Mother agreed to leave some of the children where they were, with the youngest children staying with her friend. Ultimately, neither placement worked out because after approximately two weeks, Mother requested that all of the children be moved to another home, and the Department complied. This placement also failed because Mother came to the home and harassed and threatened the caregiver. As a result, the caregiver asked the Department to remove the children. Ms. Alcorta stated she had similar interactions with Mother — Mother would call her in the middle of the night and “blow up her phone” during the day, screaming and yelling at her. Mother once came to the

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to the termination of Mother’s parental rights to the two youngest children. The only testimony he provided related to his prior and current imprisonment, his failure to complete a service plan, and his interaction or lack thereof with A.N.Y. and A.T.Y.



office and “caused a really big scene,” forcing Ms. Alcorta to call security to escort Mother off the premises.

Ms. Alcorta testified the four oldest children were taken to ChildSafe for forensic interviews. Ms. Alcorta recommended this action after learning that thirteen-year-old A.A.S. III claimed to have witnessed a rape when he was residing with Mother, and that A.N.Y. had alleged Mother was using drugs.

Ms. Alcorta was present during the interview with the children. During A.N.Y.’s interview, A.N.Y. said she feared Mother. She stated she never knew when Mother might come home, and that at times, the children locked themselves in the bathroom because of the drug usage. When asked about the types of drugs Mother used, A.N.Y. mentioned marijuana, heroin, and pills. During the interview, A.N.Y. related that she once called a cousin to come and pick her up because Mother was so drunk that she did not even realize “somebody was trying to take advantage of her.” A.N.Y. said she and A.A.S. III often stayed with a cousin because it was a more stable environment. When they were with Mother, they often missed school.

Ms. Alcorta testified thirteen-year-old A.A.S. III stated during the interview that when he was living with Mother, he witnessed a rape. In fact, he was instructed to videotape the rape. A.A.S. III was twelve-years-old at the time. He also said he believed Mother used drugs, but he was not sure.

According to Ms. Alcorta, twelve-year-old A.A.S. denied Mother used drugs, but admitted that before he went to school, he had to make sure his two younger brothers were fed “because they wouldn’t eat all day.” He made sandwiches for A.C.Y. and bottles for A.T.Y before he went to school. Eight-year-old A.C.Y. stated during his interview that Mother “drank a lot of beer and smoked weed.” He also said there were a lot of people coming in and out of their residence.

Ms. Alcorta also testified about her interaction with Mother. When first asked, Mother denied any use of illegal drugs, admitting only to use of anti-depressants, claiming she was actively under a doctor's care. Mother was required to submit to a drug test. Ms. Alcorta testified the results of Mother's drug test showed Mother tested positive for methamphetamine, benzodiazepine, marijuana, and heroin. According to Ms. Alcorta, Mother was asked several times during the first couple of months to submit to drug treatment, and was referred to Lifetime Recovery, but she never actually went during that first four to six weeks. Mother was also asked to seek counseling and obtain stable housing. The Department provided resources to assist Mother in these endeavors. After the drug test results, the case moved from temporary safety plan status to a family-based plan. A service plan was created for Mother (and for each father).

2. Valencia Wright — Department Caseworker

Ms. Alcorta worked with Mother and the children for a little over a month. After that, Valencia Wright, another Department investigative caseworker, took over. She was called as the Department's second witness. Ms. Wright testified the children came into Department care because of allegations they were exposed to drug and sexual activity. There were allegations that Mother was prostituting herself, bringing unknown people in and out of the motel room while the children were there. The children lacked stable living conditions; the older children often sought refuge in the homes of relatives in order to attend school.

Ms. Wright testified she met with Mother approximately two months after the Department's initial contact with the family. At that time, she went over the service plan with Mother. Under the service plan, Mother was required to maintain stable housing, seek employment, attend individual counseling, attend parenting classes, complete a psychological evaluation, obtain a drug assessment and treatment if needed, and stay in contact with the Department. Mother was also required to submit to random drug testing.

Ms. Wright stated Mother completed only her psychological evaluation and her parenting classes. As a result of the psychological evaluation, Mother was diagnosed with bipolar disorder mixed with “mood congruent psychotic features,” generalized anxiety disorder, and panic disorder. Dr. Michelle Moran, who assessed Mother, recommended therapy and psychiatric treatment. Mother advised Dr. Moran she was seeking treatment. According to Ms. Wright, Mother failed to follow through with her counseling. Although Mother went to some therapy sessions, the therapist ultimately discharged her because she was often late and then failed to show up at all.

Mother submitted to random drug testing at the onset of the case. Because she tested positive for numerous drugs, she was referred to Lifetime Recovery. However, she was not accepted into the program because she refused to admit drug use. Thereafter, Mother was referred to Drug Court, but again denied drug use, which disqualified her from the program. Despite her protestations, Mother tested positive for drugs in May, October, November, and December of 2015. The drugs included benzodiazepine, marijuana, morphine, and methamphetamine. Mother tested positive for benzodiazepine again in February 2016, but was able to produce a prescription for Xanax, rendering this drug test negative. Mother’s only true negative test was in June 2015. According to Ms. Wright, Mother refused “at least five times” to submit to drug testing — sometimes she simply failed to respond, other times she provided excuses for being unable to appear for a test. Mother was also referred to at least two other inpatient facilities given that she continued to fail her drug tests, but Mother failed to seek the recommended treatment.

Ms. Wright provided additional testimony about Mother’s drug use based on posts that appeared on Mother’s Facebook page. In December 2015, a post appeared on the page wherein Mother appeared to be seeking to purchase Xanax. A post from January 2016 inquired about “pain pills for sale.” Then a third post in February 2016 stated Mother was seeking “a blunt of climax.” There was another post seeking drugs the day before the final hearing, which occurred in May

2016. According to Ms. Wright, the posts show Mother is “still engaging in drug activity as recent as our last few court hearings.” Thus, she is continuing to engage in behaviors that initially resulted in the removal of her children.

Ms. Wright testified Mother was unable to secure stable housing. In May 2016, Ms. Wright attempted to obtain an address for Mother, but Mother refused to disclose where she was living. Mother advised Ms. Wright she was applying for jobs, but she failed to provide proof of employment or proof she was receiving social security disability payments. Mother has been “very irate” with the Department and the children’s caregivers. She suffers from mental health issues, which she refuses to address, and denies drug usage — despite tests to the contrary — and refuses to seek treatment. In sum, according to Ms. Wright, Mother is not an appropriate caregiver for her children.

As to visitation with the children, Mother was allowed supervised visits once a month. Ms. Wright testified Mother exercised all her visitation rights except for November 2015. On that occasion, Ms. Wright went to the residence where Mother was staying to transport her to the visitation site. However, when she arrived, she was told Mother was not there. Ms. Wright texted Mother. Mother responded, advising Ms. Wright that she was not going; she was upset because she had tested positive for drugs and she did not want the children to see her.

Ms. Wright testified that at times visitations with the children were “really good.” Ms. Wright admitted the children are bonded with their mother, but advised they have also bonded with their current caregivers. Although visitations were generally good, there were some problems during visitation, generally with A.N.Y. Early on, in June 2015, Mother was supposed to visit with the boys and Ms. Wright brought A.N.Y. to the visitation so she could see her brothers and Mother as well. During the visit, Mother and A.N.Y. argued. A.N.Y. said she hated “her F-ing mom” because Mother blamed her for one of the boys crying. Then during a December visitation,

Mother told A.N.Y. it was her fault Mother was in this situation, causing A.N.Y. to cry. According to twelve-year-old A.A.S., Mother told him the entire situation with the Department was A.N.Y.'s fault — as a result, he blamed his sister for the situation. After this, Ms. Wright discontinued Mother's visits with the children. Since then, Mother has had only one visit — March 2015. After that, Ms. Wright was unable to secure further drug testing, precluding additional visitation. During her testimony, Mother denied telling A.N.Y. she was at fault, admitting the fault was hers alone.

Ms. Wright was asked about the children's current living situations and individual issues. Ms. Wright testified A.C.Y. and A.T.Y. are with N.M., who Ms. Wright described as "fictive kin." Ms. Wright explained N.M. had been Mother's aunt by marriage based on N.M.'s prior marriage to Mother's uncle; the two are now divorced and N.M. is remarried. A.C.Y. and A.T.Y. have been with N.M. since January 2016. A.C.Y. suffers from Attention Deficit Hyperactivity Disorder ("ADHD") and takes medication for the condition. A.T.Y. is scheduled to have his tonsils removed to address recurring infections. Both boys are doing well in their current placement. Ms. Wright opined that N.M. and her husband are meeting the needs of the children and will continue to meet their future needs.

### 3. Mother

Mother began her testimony by explaining why she and the children were found in a motel. Mother testified they had been living in a "four-plex," but she was forced to leave when her landlord stole property from her. She stated she used her disability check to pay for a motel room. Mother claimed she had no other choice, stating family members refused to help her and they, in fact, "are the ones that put CPS on me." She stated that this situation, coupled with the murder of her best friend, resulted in her decision to use drugs.

Mother admitted that at the time the children were removed she had been using marijuana, methamphetamines, and heroin. Mother testified she "admitted to myself . . . that I had a problem."

However, she stated, “I took care of it, you know.” Mother claimed that during the first six months of the instant case, she got “clean on my own.” But when pressed, Mother admitted she had failed several drug tests during the pending case, claiming she was “going through a little phase.”

Mother further admitted she had a prior record with the Department, but claimed she and her children always had a home, always had food, and back then, she always passed her drug tests. She claimed she has had no trouble with the Department since 2007.

Mother testified she is receiving disability payments due to anxiety and depression. She stated she is seeing a doctor every month and the doctor has prescribed Alprazolam for her mood swings and Seroquel for her insomnia. Mother claimed the Department case workers had her doctor’s information.

With regard to the elements of her service plan, Mother stated she knew what she was supposed to do and “asked for help plenty of times,” but the Department case workers were nonresponsive. Mother admitted she failed to complete counseling. Mother claimed she stopped counseling because after she missed a single class, the counselor advised she would be “knock[ed] . . . off the counseling.” She admitted she did not attempt to reenter counseling with another counselor. She also admitted she failed to obtain drug treatment and failed to appear for scheduled drug tests. She claimed, however, she failed only two drug tests – one in November and one in December. When confronted with the Facebook posts regarding drugs, Mother admitted that all but two of the posts were hers.

Mother testified she loved and missed her children, stating she is not herself without them. She admitted the children are currently in good placements and it is better that they “are not suffering with me going through what I’m going [through] and I understand that.” Mother stated there are things she still needs to work on. Although she admitted missing drug tests, she claimed her cell phone is broken and she cannot afford another one. Mother stated she is currently awaiting

a drug assessment so that she can be referred to a treatment facility — she is waiting for Ms. Wright to obtain a bus ticket on her behalf so she can travel to the assessment facility. In that same vein, Mother stated that “in the last few weeks” she has requested additional referrals from Ms. Wright. Mother testified she wants to do better. She asked for six more months to work on completing her service plan so she can regain custody of her children. Mother stated that if permitted, she would go straight from the courthouse for her drug assessment and then undertake whatever was recommended, including inpatient treatment. When asked why after a year she is now willing “to do everything” she needs to do to regain custody — including drug treatment, Mother stated that before she was not given “the proper help from my caseworkers.” She claimed to have asked for a new caseworker “more than once” so she could get help. However, when specifically asked about drug treatment, Mother continued to insist she currently does not have a drug problem and would be attending treatment simply because it has been mandated by the Department and the court. She admitted that she would tell drug assessors and treatment personnel that she does not have a drug problem.

Mother testified she has no relationship with Ms. Wright, stating they do not speak and she has to get information about her children “on the streets.” Mother testified that when she needed help, Ms. Wright ignored her. Mother said she needs a new case worker, someone who will understand her and help her “get through this.” She testified she wants her children and it is her right as a parent to have information about her children. Mother stated she needs a new case worker to allow her the best opportunity to regain custody.

As to her current living situation, Mother testified she is living with an aunt in San Antonio. Mother said she is not asking that the children be placed with her in her aunt’s home; rather, she wants an additional six months to deal with her drug issues and obtain stable housing. She stated she can afford to pay for a home with her disability check.

4. N.M. — Foster Mother of A.C.Y and A.T.Y.

N.M. advised the factfinder she was formerly married to Mother's uncle. A.C.Y. and A.T.Y, the two youngest boys, have been with N.M. and her husband for approximately four months. According to N.M., eight-year-old A.C.Y. and two-year-old A.T.Y. are doing "extremely well." N.M. stated A.C.Y. is on the "A-B honor roll," has adjusted well in school, and made many friends. A.T.Y. is in speech therapy and will soon have his tonsils removed.

N.M. testified she is willing to provide a permanent home for the boys. If permitted, she would like to adopt them. She stated she loves them as if they were her own. She wants to provide them with a stable environment. N.M. wants the boys to realize that the way they were living with their Mother is not the way it should be. N.M. has the boys on a schedule and has given structure to their lives. When she takes A.C.Y. to an amusement park or to church, he always says, "Oh, Aunt [N.M.], I have never done this." N.M. enjoys showing the boys new things and seeing their reactions.

N.M. also testified that she has been working with the uncle who is caring for A.A.S. III and A.A.S. They have arranged sibling visits to allow the boys to continue bonding. She stated the visits have gone well.

5. A.N.Y.

The final witness to testify was fifteen-year-old A.N.Y., who was called by the attorney ad litem for the children. A.N.Y. expressed a desire to testify. A.N.Y. began by expressing her desire to go home to her mother. She said she wants to return to San Antonio and live with Mother. When asked about returning given Mother's drug usage and inability to provide stability, A.N.Y. stated that "people change." A.N.Y. testified Mother has changed, claiming Mother is now trying to do better, but admitting initially Mother was not trying.



### *Application*

We must now apply the applicable law to the evidence presented, reviewing it under the proper standard of review. In doing so, we consider the *Holley* factors as well as the facts set out in section 263.307 of the Code. *See* TEX. FAM. CODE ANN. § 263.307(b); *Holley*, 544 S.W.2d at 371–72.

#### *1. Desires of the Child*

At the time of trial, A.C.Y. and A.T.Y. were eight and two-years-old. Although A.C.Y. was seemingly old enough to state his desires, there was no specific testimony in this regard. Ms. Wright admitted, however, that all of the children were bonded with Mother, but noted A.C.Y. and A.T.Y. were also bonded with their foster parents. As to A.T.Y., he was only two-years-old at the time of trial. Thus, he is unable to express his desires regarding conservatorship. *See* TEX. FAM. CODE ANN. § 263.307(b)(1) (child’s age and physical and mental vulnerabilities); *Holley*, 544 S.W.2d at 371–72. With regard to A.T.Y.’s desires, the trial court was entitled to consider testimony regarding his current placement and the time spent with Mother. *See In re U.P.*, 105 S.W.3d 222, 230 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). “When children are too young to express their desires, the fact finder may consider that the children have bonded with the foster family, are well-cared for by them, and have spent minimal time with a parent.” *In re J.D.*, 436 S.W.3d 105, 108 (Tex. App.—Houston [14th Dist.] 2014, no pet.). The testimony shows A.C.Y. and A.T.Y. had been with N.M. for approximately four months at the time of trial. They have visited with Mother approximately eight times — once a month during eight separate months — since the removal. However, the Department discontinued Mother’s visitations after Mother failed to submit to additional drug testing. *See* TEX. FAM. CODE ANN. § 263.307(b)(8) (whether there is history of substance abuse by child’s family or others who have access to child’s home); *id.* § 263.307(b) (10) (willingness and ability of child’s family to accept and complete counseling

services and cooperate with agency's close supervision); *id.* § 263.307(b)(11) (willingness and ability of child's family to effect positive environmental and personal changes within reasonable period of time); *Holley*, 544 S.W.2d at 371–72. According to N.M., A.C.Y. and A.T.Y. now have structure in their lives, and N.M. and her husband desire to adopt both of them. N.M. has placed A.T.Y. in speech therapy and he is scheduled to have his tonsils removed to avoid recurring illness.

2. *Emotional & Physical Needs/Emotional & Physical Danger*

Both A.C.Y. and A.T.Y. are very young and will require constant emotional and physical support for many years. *See* TEX. FAM. CODE ANN. § 263.307(b)(1); *Holley*, 544 S.W.2d at 371–72; *In re J.G.M.*, No. 04-15-00423-CV, 2015 WL 6163204, at \*3 (Tex. App.—San Antonio Oct. 21, 2015, no pet.) (mem op.). Their ages render them vulnerable if they are left in the custody of a parent who is unable or unwilling to protect them and attend to their needs. *See* TEX. FAM. CODE ANN. § 263.307(b)(1); *Holley*, 544 S.W.2d at 371–72; *J.G.M.*, 2015 WL 6163204, at \*3. In addition, A.C.Y. has been diagnosed with ADHD and must take medication for his condition. *See* TEX. FAM. CODE ANN. § 263.307(b)(1); *Holley*, 544 S.W.2d at 371–72. A.T.Y. continually suffers from infections, requiring that his tonsils be removed. *See* TEX. FAM. CODE ANN. § 263.307(b)(1); *Holley*, 544 S.W.2d at 371–72

Mother's inability to protect the boys or attend to their needs was demonstrated by statements by their brother, A.A.S. As set out above, when A.C.Y. and A.T.Y. were with Mother, they had to depend on their twelve-year-old brother, A.A.S., to provide for them. *See* TEX. FAM. CODE ANN. § 263.307(b)(12) (whether child's family demonstrates adequate parenting skills); *Holley*, 544 S.W.2d at 371–72. A.A.S. stated during his interview at ChildSafe that he had to ensure his two youngest brother were fed before he left for school. *See* TEX. FAM. CODE ANN. § 263.307(b)(12); *Holley*, 544 S.W.2d at 371–72. He would make sandwiches for A.C.Y. and

bottles for A.T.Y. before he left, otherwise, the boys “wouldn’t eat all day.” *See* TEX. FAM. CODE ANN. § 263.307(b)(12); *Holley*, 544 S.W.2d at 371–72.

While the boys were with Mother, they were living in a motel room Mother may have used for prostitution, and were certainly exposed to some sort of sexual activity given statements by the other children. *See* TEX. FAM. CODE ANN. § 263.307(b)(12); *Holley*, 544 S.W.2d at 371–72. They were also exposed to drug use by Mother and others. *See* TEX. FAM. CODE ANN. § 263.307(b)(8); *id.* § 263.307(b)(12); *Holley*, 544 S.W.2d at 371–72. As A.N.Y. admitted during her ChildSafe interview, the children were sometimes forced to lock themselves in the bathroom because of the drug use. *See* TEX. FAM. CODE ANN. § 263.307(b)(8); *id.* § 263.307(b)(12); *Holley*, 544 S.W.2d at 371–72. And A.C.Y. admitted during his ChildSafe interview that Mother “drank beer and smoked weed.” It is undisputed Mother tested positive for numerous drugs throughout the course of her involvement with the Department, but even at trial continued to deny she had a drug problem. *See* TEX. FAM. CODE ANN. § 263.307(b)(8); *id.* § 263.307(b)(12); *Holley*, 544 S.W.2d at 371–72. Mother described her drug use as “a little phase” and continually denied she was a drug addict. *See* TEX. FAM. CODE ANN. 263.307(b)(8); *id.* § 263.307(b)(11); *Holley*, 544 S.W.2d at 371–72. She denied it when she was initially referred to Lifetime Recovery, when she was referred to Drug Court, and even during the final hearing. Mother stated she was willing to undergo a drug assessment and take whatever action was recommended, but only because that was required by the Department and the court, not because she believed she had a drug problem. *See* TEX. FAM. CODE ANN. 263.307(b)(8); *id.* § 263.307(b)(11); *Holley*, 544 S.W.2d at 371–72. Lifetime Recovery and the Drug Court refused to allow her into their programs for this very reason.

Mother has not challenged the trial court’s findings that she: (1) knowingly placed the children or allowed the children to remain in conditions that endangered their physical or emotional well-being; (2) engaged in conduct or knowingly placed the children with someone who

engaged in conduct that endangered their physical or emotional well-being; (3) failed to comply with the provisions of a court order that established the actions necessary for her to obtain the return of the children; and (4) used a controlled substance in a manner that endangered the health or safety of the children and (a) failed to complete a court-ordered substance abuse program, or (b) after completion of such program, continued to abuse a controlled substance. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (O), (P). Although this does not relieve the Department from proving termination is in the best interests of A.C.Y. and A.T.Y., the termination grounds are probative on the issue of their best interests. *See C.H.*, 89 S.W.3d at 28; *B.R.*, 456 S.W.3d at 615.

Mother admitted past involvement with the Department, and a history of drug use. Although an act or omission from the past does not automatically prove termination is currently in a child's best interest, the trier of fact is entitled to measure a parent's future conduct by his or her past conduct in making a best-interest determination. *In re J.F.B.*, No. 04-15-00234-CV, 2015 WL 5837852, at \*2 (Tex. App.—San Antonio Oct. 7, 2015, pet. denied) (mem. op.). Thus, Mother's prior history with the Department and previous drug use was a proper consideration for the trial court in making its determination as to the best interests of the children.

Mother's prior and continuing choices portend future instability, thereby endangering A.C.Y. and A.T.Y. *See B.R.*, 456 S.W.3d at 616. The trial court was entitled to infer from her not so distant past conduct, that similar conduct would recur, i.e., that she would continue to use and seek out drugs. *See B.R.*, 456 S.W.3d at 616. The danger of drug relapse, given Mother's refusal to admit she has a problem, creates instability and physical and emotional danger for A.C.Y. and A.T.Y. should they be reunited with Mother.

### 3. Parenting Abilities/Available Programs

The evidence of drug use and Mother's continued refusal to admit her drug problem, exposure to sexual activity, and daily instability are also relevant to Mother's inability to properly

parent. *See* TEX. FAM. CODE ANN. § 263.307(b)(8); *id.* § 263.307(b)(11); *id.* § 263.307(b)(12); *Holley*, 544 S.W.2d at 371–72. Mother chose to use drugs and place her children, including her two youngest boys, in a living situation that endangered their welfare. Mother continued to seek drugs, as shown by her Facebook posts, and used drugs at a time when regaining custody should have been her highest priority. *See* TEX. FAM. CODE ANN. § 263.307(b)(8); *id.* § 263.307(b)(11); *id.* § 263.307(b)(12); *Holley*, 544 S.W.2d at 371–72.

The Department created a service plan for Mother and the trial court adopted the plan as a requirement for reunification. *See* TEX. FAM. CODE ANN. § 263.307(b)(10); *id.* § 263.307(b)(11); *Holley*, 544 S.W.2d at 371–72. Mother was required to seek and obtain stable housing and employment. She was also required to complete a drug assessment and any treatment recommended thereafter. The service plan mandated that she complete individual counseling, parenting classes, and a psychological evaluation. She was further required to keep in contact with the Department and submit to random drug tests. Mother completed only her psychological evaluation — which diagnosed Mother with bipolar disorder, an anxiety disorder, and a panic disorder — and her parenting classes. *See* TEX. FAM. CODE ANN. § 263.307(b)(10); *id.* § 263.307(b)(11); *Holley*, 544 S.W.2d at 371–72.

Despite the diagnoses from the psychological evaluation and her continued failure of random drug tests, Mother failed to complete individual counseling and drug treatment. *See* TEX. FAM. CODE ANN. § 263.307(b)(10); *id.* § 263.307(b)(11); *Holley*, 544 S.W.2d at 371–72. Mother began therapy with a counselor, but she was ultimately discharged because she was often late or failed to attend sessions. *See* TEX. FAM. CODE ANN. § 263.307(b)(10); *id.* § 263.307(b)(11); *Holley*, 544 S.W.2d at 371–72. As for drug treatment, as noted above, Mother refused to admit she had a drug problem, continually stating she had taken care of it on her own. Mother’s refusal to admit to a problem — despite failing numerous drug tests and continuing to seek drugs through

social media — disqualified her from the two programs to which she was referred. *See* TEX. FAM. CODE ANN. § 263.307(b)(10); *id.* § 263.307(b)(11); *Holley*, 544 S.W.2d at 371–72. Even when she testified, Mother stated she would agree to seek treatment, but only because it was mandated, not because she had continuing drug issues. She also admitted she would tell any future drug assessment facility that she did not have a drug problem.

4. *Plans for Child by Those Seeking Custody/Stability of Home or Proposed Placement*

Mother’s lack of stability is demonstrated by the evidence — mental health issues, continued drug use, failure to obtain stable housing in a reasonable time, exposing her children to sexual activity and dangerous individuals. *See* TEX. FAM. CODE ANN. § 263.307(b)(8); *id.* § 263.307(b)(12); *Holley*, 544 S.W.2d at 371–72. Despite ongoing drug use and the psychological diagnoses, as well as instructions from the court and the Department with regard to these issues, Mother refused to seek drug treatment or counseling during the course of her involvement with the Department. *See* TEX. FAM. CODE ANN. § 263.307(b)(10); *id.* § 263.307(b)(11); *Holley*, 544 S.W.2d at 371–72. It was only at the final hearing that Mother requested additional time — six months — to effectuate the changes and take advantage of the services offered. *See* TEX. FAM. CODE ANN. § 263.307(b)(10); *id.* § 263.307(b)(11); *Holley*, 544 S.W.2d at 371–72. Mother seems to lack the ability to discard her unhealthy relationship with drugs, continually denying addiction. *See* TEX. FAM. CODE ANN. § 263.307(b)(10); *id.* § 263.307(b)(11); *Holley*, 544 S.W.2d at 371–72.

In addition, it seems Mother has no familial or other support system. *See* TEX. FAM. CODE ANN. § 263.307(b)(13) (whether adequate support social system consisting of extended family and friends is available); *Holley*, 544 S.W.2d at 371–72. Although she is currently residing with an aunt, she testified she did not intend to bring her children into that home. Mother testified family members refused to help her, claiming it was her family members the reported her to the Department. *See* TEX. FAM. CODE ANN. § 263.307(b)(13); *Holley*, 544 S.W.2d at 371–72. Mother

was unable to provide specific plans on where she intended to reside if the children were returned, stating vaguely that she would use her disability payments to secure housing.

In contrast, N.M.'s home, where A.C.Y. and A.T.Y. currently reside, provides unquestionable stability. *See Holley*, 544 S.W.2d at 371–72. N.M. and her husband have provided the boys with structure and exposed them to experiences previously unavailable to them, e.g., church, amusement parks. The structured home has allowed A.C.Y., whose school attendance in the past was inconsistent, to make the “A-B honor roll.” A.T.Y. is getting needed speech therapy and proper care for his medical issues. The boys have bonded with N.M. and she has ensured they have continued contact with their two older brothers, who currently reside with a maternal uncle. *Id.* N.M. stated her intent to adopt the boys if possible, providing them with a stable, structured home where they can reach their highest potentials. *Id.* There was no evidence indicating problems or instability in the foster home.

5. *Acts or Omissions Indicating Parent-Child Relationship Not Proper/Excuses*

The evidence of acts or omissions by Mother that indicate she had an improper relationship with her youngest boys are those set forth above in our discussion of Mother's acts that physically and emotionally endangered them, particularly Mother's continued drug use. *See Holley*, 544 S.W.2d at 371–72. Additional acts or omissions are detailed in our discussion of her lack of parenting abilities and use of services.

Mother attempted to excuse her failures by blaming others. *See Holley*, 544 S.W.2d at 371–72. She blamed her landlord and family members for her living situation, stating she was forced to live in the motel because her landlord stole from her and her family refused to help her. *Id.* She blamed her drug use on losing her “four-plex” home and the death of her best friend, describing her drug use as a “little phase.” *Id.* According to Mother, she discontinued counseling because she missed a single class and was advised she would be “knock[ed] . . . off the counseling.”

She blamed missed drug tests on a broken cell phone. *Id.* She blamed her caseworkers, Ms. Alcorta and Ms. Wright, for failing to assist her in completing her service plan and obtaining the return of her children. *Id.* Mother claimed the caseworkers ignored her and her requests for help. *Id.* Mother advised that if she was assigned a new caseworker, she would be able to make the changes necessary to regain custody of the children. *Id.* In sum, according to Mother, her issues and failures were the fault of others; she bore no responsibility. *Id.*

### *Summation*

Mother exposed her children to her own drug use and drug use by others. She failed to submit to numerous drug tests and failed the majority of those she submitted to. Even up to the final hearing, Mother refused to admit a drug problem, and the evidence showed continued drug use. Mother exposed her children to sexual activity. She failed to provide for A.C.Y. and A.T.Y.'s basic needs. A.C.Y. and A.T.Y. were essentially left in the care of their older siblings, with their twelve-year-old brother providing for their basic needs. She failed to complete most of the items on her service plan and blamed her failure on others. Mother's refusal to take responsibility or own up to her own failings suggests continued dysfunction and instability. *See B.R.*, 456 S.W.3d at 616; *M.R.*, 243 S.W.3d at 821 (holding evidence of parent's unstable lifestyle can support fact finder's conclusion that termination is in child's best interest). Only when termination was at hand did Mother make overtures with regard to the actions necessary to regain custody of A.C.Y. and A.T.Y. However, "[b]y requiring all termination suits to be completed within a year, the Legislature made clear that courts cannot leave children in foster homes indefinitely while existing parents try to improve themselves and their conditions." *In re A.F.*, No. 04-16-00008-CV, 2016 WL 3626235, at \*7 (Tex. App.—San Antonio July 6, 2016, no pet.) (quoting *In re M.G.D.*, 108 S.W.3d 508, 515 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).



Mother testified that she loves her children and without them, she is not herself. However, the focus of a best interest inquiry is on the best interest of the *child*, not the parent. *D.M.*, 452 S.W.3d at 470; *In re A.M.*, 385 S.W.3d 74, 80 (Tex. App.—Waco 2012, pet. denied). And that A.C.Y. and A.T.Y. love Mother and enjoy visits with her is only marginally relevant in our determination of the best interests of the children. *See A.M.*, 385 S.W.3d at 80.

Therefore, based on the foregoing, we hold the relevant *Holley* factors, as well as those set out in section 263.307(b) of the Code, weigh in favor of a finding that termination was in the best interests of A.C.Y. and A.T.Y. *See* TEX. FAM. CODE ANN. § 263.307(b); *Holley*, 544 S.W.2d at 371–72. Recognizing that in conducting a best interest analysis, the trial court was permitted to (1) consider circumstantial evidence, subjective factors, and the totality of the evidence, in addition to the direct evidence presented, and (2) judge Mother’s future conduct by her past conduct, we hold the trial court was within its discretion in finding termination of Mother’s parental rights would be in the boys’ best interests. *See B.R.*, 456 S.W.3d at 616. In other words, we hold the evidence is such that the trial court could have reasonably formed a firm belief or conviction that termination was in the best interests of A.C.Y. and A.T.Y. *See J.P.B.*, 180 S.W.3d at 573.

### CONCLUSION

Based on our review of the evidence given the applicable law and the mandated standard of review, we hold the evidence is legally and factually sufficient to have permitted the trial court, in its discretion, to find termination was in the best interest of A.C.Y. and A.T.Y. Accordingly, we hold the trial court did not err in terminating Mother’s parental rights, overrule Mother’s sufficiency complaints, and affirm the trial court’s termination order.

Marialyn Barnard, Justice