COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00485-CV

IN THE INTEREST OF B.O., THE CHILD

FROM THE 393RD DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 15-10347-393

MEMORANDUM OPINION[1]

I. Introduction

At the conclusion of the trial on the Department of Family and Protective Services (DFPS)'s petition to terminate Appellant Mother's and Appellant Father's parental rights to B.O., a jury found that while it was not in B.O.'s best interest to terminate their parental rights, appointing them as B.O.'s managing

[1]*See* Tex. R. App. P. 47.4.

conservators would significantly impair the child's physical health or emotional development. The trial court subsequently appointed DFPS as B.O.'s permanent managing conservator instead of the child's out-of-state maternal aunt D.M., who had possession of the child, and found that Mother's and Father's access to B.O. should be restricted.

In four issues in this ultra-accelerated appeal,[2] Mother and Father argue that the evidence is legally and factually insufficient to support the appointment of DFPS as B.O.'s permanent managing conservator, that DFPS failed to rebut the presumption that kinship should have priority in determining B.O.'s permanent managing conservator, that the trial court erred by refusing to appoint D.M. or another relative as permanent managing conservator based on its unfounded belief that a non-party relative could not be appointed, and that the trial court erred by imposing limits on them as possessory conservators "without sufficient consideration of the factors required to protect the best interest of the child." They request a remand for a factual determination of the present risk, if any, that they present to B.O. through reasonable access and a determination of the minimum restrictions necessary under family code sections 153.193 and 153.254, and they ask this court to reverse the trial court's judgment as to the

[2]This appeal is subject to the same deadlines as a termination-of-parental-rights appeal. *See* Tex. R. Jud. Admin. 6.2(a), *reprinted in* Tex. Gov't Code Ann. tit. 2, subtit. F app. (West 2013) (requiring appellate court to dispose of appeal of "a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship," so far as reasonably possible, within 180 days after notice of appeal is filed).

issue of managing conservatorship, appoint D.M. and the child's maternal great-aunt as B.O.'s permanent managing conservators, and dismiss DFPS from the case. We affirm.

II. Factual and Procedural Background

A. Origination of the Instant DFPS Case

Tina Hahn, a social worker at the Medical Center of Plano, met with Mother and Father after B.O. was born in December 2015. While visiting about the new baby, Mother and Father told Hahn about their son R., who DFPS had placed with Mother's mother S.M. after their five-week-old son C. had died. Hahn said that Mother and Father told her that R. had been removed because Mother had tipped over an ashtray full of ashes and cigarette butts while she was looking for the phone to call 9-1-1 for C. and that the police and paramedics had said that the place was filthy "just because the ashes and the ashtray had dumped over."

Mother told Hahn that she knew smoking presented a risk for Sudden Infant Death Syndrome (SIDS) and then Father added that they smoked outside. Hahn said that Father's statement raised a flag for her in light of their prior statement about the ashtray full of ashes and cigarette butts, but before she could investigate further, an echocardiogram tech came for Mother, ending the visit. Hahn informed the charge nurse that she was going to call DFPS for a determination of whether further investigation was warranted.

Based on the initial investigation and the family's DFPS history, DFPS investigator Jillian Crompton then received a "Priority 1" report about B.O. The Priority 1 classification meant that Crompton had twenty-four hours to make contact with the child. Before going to the hospital, Crompton reviewed Mother and Father's prior DFPS cases from August 2013[3] and October 2013.[4]

Mother and Father had not been financially well off in 2013, but they had both been employed and able to provide for their children's basic needs.[5] By

[3]In August 2013, when Mother took R., then a toddler, to the emergency room for something stuck in his nose, he allegedly went into the parking lot without supervision. Mother claimed that this allegation was false. Mother was pregnant with C. at that time. After C. was born, DFPS provided resources to help support the family; R.'s case was closed after the home and family were deemed safe. DFPS gave Mother and Father a "pack n' play" for C. when he was born so that he would have a place to sleep because they did not have anywhere for him to sleep.

[4]In October 2013, DFPS received a referral about Mother and Father when C., then only one month old, died. C.'s death involved asphyxia; he also had a skull fracture. Mother had fallen asleep with C. next to her in the bed. Father woke up at 4 a.m. to go to the bathroom and noticed a bloody red froth coming from C.'s nose. He called an ambulance and the child was taken to the hospital and pronounced dead at 4:35 a.m. R. was removed from Mother and Father after C.'s death and was placed with S.M. At some point after C. died, Father tested positive for methamphetamine.

[5]Father had his own tree service business, and Mother had worked at a restaurant. S.M. said that over the course of Mother and Father's six-year marriage, she could not count the number of weeks that they had been homeless but said that it had consistently occurred. When Mother cross-examined S.M., she demanded, "I've never told you I was homeless. When did I tell you I was homeless, please?" S.M. replied, "When you sent me the picture of yourself panhandling holding a sign that said 'homeless.'" Father was with Mother when she was arrested on warrants after police encountered her panhandling in July 2016. Father denied that he had been consistently homeless and said that the only time he had ever been homeless was while Mother was pregnant with B.O.

2015, Mother and Father's financial circumstances had deteriorated, leaving them homeless.[6]

According to Crompton, when she introduced herself to Mother and Father as a DFPS investigator, they became upset. After Crompton reassured them that she was there to help, they gave her the names and contact information for their probation officers. Crompton learned about concerns for the parents' living conditions from Father's probation officer. Father told Crompton that "things weren't actually going so well with the tree trimming business" and that Mother had lost her job,[7] they were homeless, and they were concerned about living with a friend who had a drinking problem. Mother and Father also told her that although they had a crib for B.O., it was infested with bed bugs.

In light of C.'s asphyxiation-related death two years earlier and the lack of a crib for B.O., DFPS became concerned that the parents would co-sleep with the newborn, so Crompton asked Mother and Father to call friends or family to find someone who could take care of B.O. But those whom Mother and Father suggested at that time were not eligible to take B.O. based on criminal history or

[6]This was a far cry from their financial status in 2006, when Mother and Father first met. Mother said that when she met Father, he had had a good-paying job as a landman and she had been working at a restaurant where, over the course of two years, she had gone from daytime cashier to assistant manager. They started dating in 2009. Mother said that they started the tree service together after she was fired from the restaurant for being late too many times.

[7]Mother and Father regularly visited R. until Mother lost her job.

DFPS background.[8] When Mother and Father were not able to identify any potential caregivers who could pass DFPS or criminal background checks, they became so upset that security had to be called. Crompton said, "They got down on the ground, began praying, speaking in tongues, came closer to [Crompton] . . . begging not to take their child." Mother and Father thereafter left the hospital—Mother's departure being against medical advice, as Mother had not been formally discharged after giving birth.

Crompton found a foster placement for B.O. that day, and Mother and Father were given standard visitation of one hour a week at the DFPS office. The next day, when they arrived for their visit at the DFPS office, they were wearing the same clothes they had worn at the hospital. They explained to Crompton that they had slept in their car and had prayed in the woods all night for B.O.[9] When Crompton asked for more information about the family, Father

[8]Crompton said that Father also called an adoption agency to find a possible placement, but Crompton said that he did not appear to understand that by doing so, they would be placing B.O. for adoption, which she did not think they intended to do.

[9]Crompton offered Mother and Father contact information for homeless shelters but they insisted that they needed possession of B.O. to get into one, even though shelters were available that did not require a family to have a child. Father testified that Mother's pregnancy with B.O. had been planned and that they were especially excited about her birth because B.O.'s presence would get them into the shelter they preferred:

> [T]he baby was coming, [and] we had the petitions that we were going to take, you know, [B.O.] to - - to one of the shelters that would accept us as a family that would not accept us if we did not come with baby. We had that set up. We had Medicaid, WIC, food

described his other children—a twenty-one-year-old daughter, a sixteen-year-old son, an eight-year-old daughter, and twin six-year-old sons—as "the children that I never got close to." Father also acknowledged owing a lot of money in child support in Arizona for the oldest three children but claimed that he could not pay. At trial, he invoked his Fifth Amendment privilege as to the amount. He claimed that he had never been ordered to pay child support for the twins because the children's mother's aunt was a multimillionaire.[10]

At their next weekly visit, Mother and Father were once again wearing the same clothing they had worn the week before and still had not found housing. It did not appear to Crompton that they had showered, and she testified that they "smelt of cigarettes" and had dirt under their fingernails. On their third visit, Mother and Father were still unkempt and "not very hygienic." Crompton said that they displayed some "erratic behaviors," stating,

> They spoke the Word to the child. [Father] would get on his knees and pray. [Mother] would hold the child. They would pray over the child, sing hymnals [sic]. They would sometimes kind of - - if [Mother] wanted to hold the child, [Father] wouldn't actually let [B.O.] go at first, and vice versa. They both wanted the same amount of time with [B.O.]

> stamps all set up. The shelter that we had was going to accept us as long as we showed up as a family.

[10]B.O.'s court appointed special advocate (CASA) volunteer testified that Father told her that the reason he would not get a job is because he owed $100,000 in back child support for his other children. During Mother's cross-examination of Father, he stated that even though he owed child support, "they receive gifts under the table throughout those years. You understand? Trampolines."

Yet, as far as the mechanics of holding and caring for B.O., Crompton considered the parents as "appropriate." According to Crompton, she had no criticism of Mother's handling of B.O., but sometimes Father would not support B.O.'s head when holding her, which Crompton described as "concerning."

Mother and Father were not receptive to receiving any assistance from DFPS, and they told Crompton that they would not cooperate with the department. Instead, they argued that Crompton was in the wrong and that removing B.O. from them was unconstitutional.

B. Initiation of the Termination Case

DFPS filed its "Original Petition for Protection of a Child, for Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship" in December 2015. In the petition, DFPS alleged that B.O. had been taken into DFPS's possession on an emergency basis. DFPS sought temporary managing conservatorship and temporary orders and asked that if the child could not be safely reunited with either parent but could be permanently placed with a relative or other suitable person, the trial court should appoint the relative or other suitable person as the child's permanent managing conservator. If the child could not be permanently placed with a relative or other suitable person, then DFPS asked for appointment as the child's permanent sole managing conservator provided that (1) the parents' rights were terminated or (2)

the parents' rights were not terminated and DFPS specifically consented in writing to being appointed permanent sole managing conservator.

After an adversarial hearing, Mother and Father were ordered to work DFPS services and were granted an additional hour per week of visitation with B.O. Mother was ordered to complete a psychological evaluation, to participate in and successfully complete parenting classes and weekly counseling sessions, to participate in a domestic violence prevention program, to complete an intake with Denton County Mental Health and Mental Retardation (MHMR), to participate in a drug and alcohol assessment and follow through with any resulting recommendations, to attend "no fewer than five AA/NA meetings per week," to submit to random drug tests, to maintain safe, stable, and appropriate housing and suitable employment for at least six months and then for the duration of the case, to refrain from all criminal activities and comply with her probation terms and conditions, to refrain from any and all unsupervised contact with children under the age of sixteen, to call to confirm her visits with B.O. one day before they were scheduled to occur, and to pay child support for B.O. Father was assigned the same services in addition to participation in a "FOCUS fatherhood" program and in a violence intervention and prevention program.

During the course of the DFPS case, Mother and Father complained that their poverty prevented them from working on their service plan. When Lauren Lay, their first DFPS caseworker, started the case, Mother and Father told her that they were living with Mother's grandmother in Carrollton, but between the

adversary hearing and the next status hearing, they no longer lived there and were living in their vehicle at a gas station. From time to time, when they had the money, they would pay to shower at a gas station.

Although Lay referred Mother and Father to a Salvation Army shelter, they refused to go there, instead insisting that they needed to have B.O. with them to receive accommodations at another shelter they preferred. By late June or early July, Mother and Father had found housing in a trailer home.

Lay said that during the course of the case, other than assisting Father with the tree trimming business, Mother worked only for a brief period at a restaurant. Lay characterized her interactions with Mother and Father during the case as difficult, stating that the parents were aggressive in their tone with her at times and explaining, "I often wasn't allowed to speak. I was spoken over. I was berated with questions, and if I attempted to answer them, more questions would come." Mother and Father also threatened her and told her that she "would always be barren for the work that [she did]." On more than one occasion, Mother and Father had to be physically removed from the DFPS office. While B.O. was in foster care, Father sent Lay a text message threatening that if the child was not returned to him and Mother, he would call in a kidnapping charge and an AMBER alert using the foster parents' license plate.

Mary Ann Harrison, B.O.'s CASA volunteer, testified that when she first met them in December, Mother and Father had been argumentative but that their behavior then escalated to threats and harassment. Mother sent her multiple text

messages, some of which included threats, and Mother even threatened to sue Harrison personally if she testified.[11] Harrison described Mother as verbally aggressive and related that Mother had threatened her with a lawsuit, but had stopped short of threatening her with physical harm.

But at one point the hostility did become physical. Harrison testified that on May 23, 2016, Mother had gotten in her face and started pointing her finger, and as Harrison backed off, Mother continued to advance. Harrison said that the only reason Mother did not touch her was because Harrison managed to back away. Harrison testified that when this happened, she felt threatened and scared. Later that day Harrison received around thirty-seven text messages from Mother. Yet Harrison did not abandon the case to another CASA volunteer "because no one was able to work with those parents" and they "were extremely confrontational in all of their dealings." Harrison characterized all of this as unusual behavior toward a CASA volunteer.

Lay testified that most of the time, Mother and Father were appropriate with B.O. during their visits and observed that Father spent most of his time during the visits reading from the Bible in a loud voice. According to Lay, when Father did this, his shouts "echoed throughout the office." She clarified, however, that DFPS's objection was not to his reading the Bible, but to his volume in doing so because it was disruptive to other families trying to have visits as well as

[11]Mother interjected, "Yes," to this testimony.

those working in the office. Lay agreed during cross-examination that Mother and Father bonded with B.O. during their visits. However, during one visit, they also transmitted their poison ivy rash to B.O.

Eventually, Mother gave DFPS information about D.M., her half-sister who lived in New York, as a possible placement for B.O. Although Mother had never met D.M. in person, she had contacted her through Facebook, phone calls, and text messages. The New York placement for B.O. was approved two weeks before Lay's last day of employment with DFPS, and B.O. was placed with D.M. in New York during Lay's last week.[12]

Mother and Father initially agreed to place B.O. with D.M. but after learning that D.M. might seek to adopt her, they disagreed, stating that it would harm them for their child to be placed in New York. After B.O. was placed with D.M. in New York,[13] Mother and Father were allowed to visit B.O. through Skype, which they were able to access through their cell phone.

In August, Audrey Schuler, B.O.'s subsequent DFPS caseworker, visited Mother and Father at the trailer home they had purchased. She said they were

[12]S.M. testified that she had been unable to consider being a placement for B.O. because of the expenses involved in meeting R.'s needs. But she thought it important that R. and B.O. maintain a sibling relationship, and she intended to continue communication with D.M.

[13]D.M.'s home was a three-bedroom, two-bath mobile home in which she, her mother, and B.O. lived. The trial court admitted photographs of the home. D.M.'s mother took care of B.O. while D.M. was at work. According to the home study conducted on the New York placement, a redacted copy of which was admitted into evidence, twenty-two-year-old D.M. wanted to adopt B.O.

very excited to show her a pack n' play, clothes for B.O., and a small booster seat. Although there were dogs in the home, it was not dirty. It was in similar condition in September when she visited again.[14] During Father's testimony, the trial court admitted into evidence and allowed Father to publish recent photographs of their residence: living room, kitchen, bathroom and medicine cabinet, couch, his and Mother's bedroom, "what's going to be [R.]'s bedroom," running water, a functioning stove, air conditioning, smoke and carbon monoxide detectors, and a pack n' play containing new items for B.O. Father said that from the prior DFPS case, he had learned never to co-sleep with a baby and that smoking had to be done outside of the residence.

Mother and Father paid $450 a month to lease the lot, which included water and electricity. Schuler said she still had concerns about their ability to avoid homelessness in the long-term because of the month-to-month lot rental payment and the parents' history of income instability. Although she had asked Mother and Father for paycheck stubs, canceled checks, or even photographs of cash payments for their tree trimming service, they had not provided her with any. During the time that Lay was Mother and Father's caseworker, the DFPS

[14]Schuler said that the trailer home had a bedroom where Mother and Father slept and a very small room to the left that Father told her was R.'s room. R.'s room had the pack 'n play in it. Schuler did not see any hazards. She saw some baby clothing in the trailer and saw a minimal level of food in the refrigerator. She noticed the dogs but said that she did not see any dog urine or feces inside the house and that the home's interior did not have any type of particular smell.

services had been transferred to Dallas County to make their participation easier. Schuler said that despite having transferred the services to Dallas County and despite her encouragement, Mother and Father did not initiate or participate in the services. Instead, Mother and Father told her and their CASA worker that "God was their counselor and that they did not need [the services]." Mother and Father did not attend counseling in B.O.'s DFPS case.

Schuler read to the jury some of the counseling records from Father's previous Dallas DFPS case. Father had participated in eight sessions and had identified parenting and maintaining sobriety as issues before being discharged for nonattendance. Father said that he did not complete his counseling in the Dallas DFPS case because he was in jail in Denton County for three months.

Father said that he did not do his psychological exam in this case as the court had ordered because he had already gone through the process with R. and C. and had attempted to work the services at that time but still did not have his child back. Furthermore, Father said, "I believe y'all are faking me out. That's my thought that, okay, I'll do those services, everybody will get paid, and I still won't have my child back."

Schuler described her interactions with Mother and Father as less contentious than their interactions with Lay, but they were not ideal:

> I felt as if I had not as much difficulty. I have been able to sit down. We've been able to have some conversations. I have had some times where [Mother] would get very excited and get kind of in my personal space and raise her voice a little bit, but that would really be the [extent] of that.

DFPS filed its first amended petition on October 14, 2016, without any changes to the permanent conservatorship requests in the original,[15] but amending the grounds for terminating Mother's and Father's parental rights to B.O. Only three grounds remained for each parent—two endangerment grounds and a ground based on failure to comply with the court-ordered service plan—and these are the grounds that were included in the jury charge.

C. Jury Trial

The jury trial began on November 14, 2016. Before voir dire, Mother and Father elected to proceed pro se. The trial court admonished them that once the jury panel came in, they would be treated the same way that the court treated lawyers. *See Smith v. Conn Appliances, Inc.*, No. 05-16-00656-CV, 2017 WL 1075616, at *1 (Tex. App.—Dallas Mar. 21, 2017, no pet.) (mem. op.) ("[C]ourts regularly caution pro se litigants that they will not be treated differently than a party who is represented by a licensed attorney."). Yet, throughout the course of the trial, the trial court demonstrated considerable patience and judicious restraint, as the record reveals that Mother and Father's courtroom behavior was frequently disruptive, discourteous, and disrespectful.

[15]During the November 2016 trial, DFPS's representative testified that if Mother's and Father's parental rights were not terminated, DFPS was unwilling to be a joint managing conservator of B.O. with Mother and Father and unwilling to be B.O.'s sole managing conservator with the parents as possessory conservators.

1. Voir Dire

Mother and Father attempted to conduct voir dire pro se. Father began his by stating, "Hey, guys. I've never done this before. I am the dad. I've been to prison a few times in my life: Burglary, theft of means of transportation. Burglary when I was 18 years old. That's how I went and made my money." Father said that he started committing crimes when he was eighteen but that he was then forty years old. When Father began telling Bible stories, one of the prospective jurors objected. When a prospective juror declined the opportunity to hear about the relevance of the Book of Job to his case, Father remarked, "I tried to bring the Word of God here. I brought the Word of God here, and obviously nobody wants to hear it." At that point, Mother interjected, "It is us and God against the State of Texas."

Father further informed the venire that he had been to prison for five years and remarked that no one had taken his rights to his other children. One of the potential jurors asked Father, "[I]f your life is like this, why do you keep having children to be responsible for?" Father replied, "Children are a blessing from the Lord." When asked by a prospective juror if his other children lived with him, Father replied, "No, sir. [R.] was living with us up until - - it will go on in the court. But they don't want to talk about the two years we raised [R.], excellent years, awesome years. They don't want to talk about it." Father complained, "Y'all don't want to hear the Word of God. All I'm about is the Word of God and miracles, guys."

Mother then told him, “Just say you’re done.” Father followed her instructions, stating, “I’m done.” Mother then began her voir dire.

Mother started by relating her version of events, but her remarks immediately drew an objection. Mother objected to the objection, stating, “She had an opening and schmoozed the crowd. Why can’t I?” Mother then explained that her introduction would lead to a question. In the interim, she told the prospective jurors that their previous lawyers had not sufficiently represented them and that their current lawyers were not sufficiently representing them either, stating, “That’s why we are pro se.” Mother also told the potential jurors that she and Father did not trust their appointed counsel.

During Mother’s unorthodox and often rambling voir dire, the panel members began to express their own frustrations. One pleaded with Mother, “[J]ust for the peace of God, I need you to ask a question of who can be objective in this room.” Mother then asked that question. Not long thereafter, Mother asked, “Who here thinks I should not have my child?” and several raised their hands. When Mother instructed, “All hands remain in the air as high as you can, please, as high as you can, please,” one prospective juror asked, “Is that high enough?” As the judge attempted to sustain an objection that had been lodged, Mother interrupted the judge and said to the juror, “Your hand has been in the air since you’ve got in courtroom [sic].”

As the judge continued his ruling, Mother spoke over him, and although the record is silent as to what physically occurred during Mother's interaction with this prospective juror, the record does reveal the following verbal exchange:

> [Mother]: You don't even know me.
>
> PROSPECTIVE JUROR: Please don't approach me across that bar.
>
> [Mother]: You don't even know me, and you've already made judgment.
>
> PROSPECTIVE JUROR: Please keep your distance from me, lady.

At that point, another veniremember added, "Please get me down as two hands."

As the judge attempted to defuse the situation, some other nonverbal conduct involving Father occurred in the courtroom—again, which is not captured in the written record—causing the bailiff to become involved:

> PROSPECTIVE JUROR: Son, are you threatening me?
>
> [Father]: No. I'm looking at you. What are you doing?
>
> PROSPECTIVE JUROR: I don't know. What do you have to say?
>
> THE COURT: Sir, sir, sir - -
>
> [Father]: What are you doing?
>
> [Mother]: He's just looking.
>
> THE COURT: No more interaction, please, between anyone except the person that is - -
>
> THE BAILIFF: Okay.

THE COURT: - - conducting the voir dire.

Later, when one of the members of the venire suggested to Mother that she should allow her attorney to ask some questions, because "you haven't given them the chance to ask us the questions that might help you. Trust them," Mother turned to her attorney and asked, "Do you want to ask some questions?" The record reflects that when the attorney replied, "I would love to ask some questions," applause erupted from the audience. At that point, voir dire proceeded without any other significant outbursts by either parent, and a jury was empaneled.

2. Trial Procedure

The presentation of evidence took two full days and included the information set out above. Before any opening statements, the trial court laid ground rules for how standby counsel would work. After DFPS's counsel pointed out that the typical procedure in court was not to allow a "tag-team" style, Mother said, "And it hasn't been typical procedure - - anything in this courtroom yet, dude." Mother then re-emphasized to the trial court, "And I did say 'dude.'" The trial court replied, "And if you do it again, I'll hold you in contempt." Mother indicated that she understood, and then concluded with, "Your Majesty." The trial court then asked the court reporter to make a note of "each and every time that there is a . . . denegration [sic] of the process or the system," to be addressed at the end of the case.

3. Opening Statements

Father's attorney made an opening statement on his behalf and, except for a handful of improper interjections by Mother, it occurred without incident.

Mother made her opening statement pro se. Liberally sprinkled throughout her opening statement were objections, followed by admonishments by the trial court regarding proper procedure, conduct, and decorum in the courtroom. She ended her opening statement by saying,

> We are no longer the thiefs [sic] and drug addicts that we once were. We were once. We are not today. We have years and years of clean UAs. They will not be able to show you one dirty one. My husband has just completed two different probations. In the name of Jesus, he did not have any dirty UAs. I've just been to my probation office. She just UA'd me. . . .
>
> We are no longer thieves. We are no longer breaking the law. I did recently get a driving on suspended ticket. They might bring that up. I also did get a panhandling ticket. We no longer steal. And if the need comes and I need food for my table or I need gas for my vehicle to get to the next job, I will ask of the community to help me rather than go out and steal any further. I will not steal anymore. I will not ste[a]l anymore. I will now ask for help, and that's what I do now. I will go to a food bank. I will - - I'm on - - I've got food stamps. . . .
>
> I really don't know what I'm doing. Thank y'all for listening.

4. Evidence

a. C.'s Death

The jury heard evidence from the medical examiner, Dr. Candace Schoppe, who had autopsied C.'s corpse and who served on the Dallas County Child Death Review Committee. Although C.'s manner of death was listed as

"undetermined," Dr. Schoppe testified that there were no outward injuries to C.'s body but that examining his head had revealed a small skull fracture. Mother and Father had told investigators that C. had rolled from a couch onto a plywood floor, but Dr. Schoppe said that the force required to cause the injury would have been "more than just a short fall onto a plywood floor." Dr. Schoppe added that the child's lungs had a lot of extra blood in them, which occurs "not infrequently with babies that have been overlaid or have had positional asphyxia-type death." She explained that by "overlay," she meant when a small infant is not able to roll himself and get out of the way when an adult or larger sibling is co-sleeping or bed sharing. Dr. Schoppe said that the skull injury had been recent and was not consistent with birth trauma; "[i]t was probably hours to . . . a day" prior to the estimated time of death. She also stated that the skull fracture, although unusual for a nonmobile one-month-old child to have, was unlikely to have anything to do with the child's cause of death and that it likely would have healed without any significant changes to the child. Aside from the skull fracture, the baby had been healthy.

With regard to Mother and Father's trailer home, Dr. Schoppe said that the photographs of the home that she reviewed during the course of her investigation concerned her because of the number of hazards present in the environment. "There was no safe place for an infant to sleep. There were numerous things that would be choking hazards, smoking and cigarette butts in places where the infant would have been placed." Dr. Schoppe said that that the environment

would also be dangerous for the toddler who she understood also lived in the home at the time.

Some of the police officers who investigated C.'s death also testified, and photographs taken during their investigation were admitted into evidence. One of the officers testified that when he entered Mother and Father's trailer, there was a strong odor of cigarettes and a faint odor of marijuana, while another described the trailer's odor as a "[l]ittle bit of trash, little bit of marijuana, little bit of dirty clothes." One added that they found some dirty diapers inside the home and a bucket full of dirty diapers outside of the home. Although they conceded that some of the disorder in the trailer might have been caused by the police search, the police officers pointed out that they did not leave dirty dishes around, leave cigarette butts in the sink and ashtrays lying around, or pile assorted items inside of the pack n' play, as shown on the photographs admitted into evidence. One of the officers opined that based on his eleven-plus years of experience in law enforcement, the home was not safe for children. Another stated that the dangers that he saw and smelled at the scene could have been easily remedied if they were cleaned up.

Father attributed the condition of the trailer as photographed by the police to his shock and hysteria upon discovering C. According to Father, when he saw C, he "flipped [his] whole house upside down looking for the phone to call 9-1-1."

b. After C.'s Death

Mother and Father moved from the trailer house to Mother's grandmother's house in Carrollton before the police could return for further investigation. Father was subsequently arrested pursuant to a warrant when police determined that several pill bottles they saw on the dashboard of his vehicle parked outside the Carrollton house did not belong to him and contained a dangerous drug.[16]

After R.'s removal, Mother and Father were in and out of jail. They moved into another trailer park when they moved out of the Carrollton house, but Father subsequently sold the travel trailer for $1,000, stating, "[C.] died. [R.]'s over at my mother-in-law's. [Mother]'s in jail. My dog . . . got distemper because he was in a dirty dog jail."[17] Father went to Laredo and at some point ended up spending time in a Mexican jail before moving into a friend's house where he and Mother stayed off and on for a couple of months. After that, they lived in their Suburban for eight months, which they parked at a gas station with permission as long as they did not bother the customers or cause any scenes. In May 2016, a bed bug infestation broke out in the Suburban.

---

[16]During his testimony, Father said that the drugs were amoxicillin and ibuprofen "600s" in the unmarked pill bottles. Father said that "every once in a while," he would suffer from a dental abscess, treated with ibuprofen and amoxicillin, and he still had pills left but had removed the labels from the bottles. Father said that the possession charge was dismissed. Father also said that he would not have his teeth "messed with" by anyone.

[17]Father testified that when C. died, he went to jail for a traffic ticket, and his dog went to the pound.

c. Testimony about R.

The jury heard differing versions of what Mother and Father's oldest child, R., had been like when he was removed from them at C.'s death. According to S.M., when R. was placed with her, he was developmentally delayed and had very aggressive behavior. One of the caseworkers agreed that R. was developmentally delayed, testifying that when R. was removed from Mother and Father and went into care, he acted "like a wild animal" and had severe behavioral issues. R.'s CASA volunteer described him as like a feral cat.

S.M. said that R. was undisciplined and would kick, hit, bite, and punch and that initially she could not take R. to the grocery store without his grabbing food from the shelves and eating it. R. had very limited language skills at that time and was not potty trained. R. lived with her for the first thirty days of that DFPS case and then S.M. requested help from DFPS because of his violence and lack of discipline. DFPS placed him in a foster home that was specially trained to deal with children who had R.'s needs. R. subsequently returned to live with S.M. when the DFPS worker told her that they had been unable to maintain his placement because he had been "too much for the average well-trained individual to handle."

While living with S.M. during the first DFPS case, R. participated in early childhood intervention, speech therapy, behavior therapy, play therapy, and occupational therapy. Eventually, S.M. became R.'s permanent managing conservator, and Mother and Father were allowed supervised visits twice a

month for about an hour. Mother and Father paid for supervision of the visits at Hannah's House. Hannah's House was chosen as the location because S.M. and her husband did not feel safe with Mother and Father, who had made verbal and written threats to them. At trial, S.M. testified R. was five years old and in kindergarten and that he had shown continuous improvement in living with her.

In contrast to the above, Father's description of R. before he was removed from them was,

> [R.] is just your basic kid. When he was around us, he would go on jobs with us. He was a happy kid. Always getting into things. The last job we were on, there was a chicken coop of chickens. We were removing five trees, and he kept on spraying the chicken coop with water. And the rooster got a little cocky with him and tried to get him. And so the homeowner was like, "Get him away from my chickens."
>
> He kept on spraying them. But that's the type of trouble he would get into, but never hyper, never feral, never crazy. I'm assuming after he was stripped from us, that's when he became feral.

Father said that he and R. communicated "fine" and that Father himself could not read until he was in the third grade.

Bettye Stone, a director of Hannah's House, described R. as "real happy" and "always smiling." Stone said that R. had never behaved like a feral cat at the visits. Mother said that at the time of the mediated settlement involving R., she had left R. with S.M. because Mother had been living with her grandmother, who "couldn't handle . . . the hyperness and the running around of [R.] because she's got precious things that he might break."

d. Mother's and Father's Behavior

(1) Mother's and Father's Pretrial Behavior

Mother said that as a child, she had ADHD and was medicated for it from "like, 7 until 14" but asserted that she had been unmedicated her "whole adult life" and had been fine. Mother said that when she was fifteen years old, S.M. had lied to a doctor and sent her to Timberlawn for a night until a doctor saw her and told her, "Oh, you're not crazy. Go ahead and go home."

In contrast to DFPS's evidence about how Mother and Father had conducted themselves at in-person visits with B.O., Stone said that she had witnessed Father's Bible readings during their visits with R. at Hannah's House but that she did not think that they were done in a loud tone that would disrupt anyone else in the vicinity.

Northeast Police Officer Robert Wrobel testified that he had been working the night shift in May 2016 when he encountered Mother and Father just outside of the Denton city limits at around 11 p.m. After he noticed an older model Suburban-style vehicle swerving out of its lane onto the right shoulder, he checked its registration and noticed that the insurance was out of date. Officer Wrobel pulled up behind the vehicle, which turned into a gas station, and that was when he noticed that the vehicle's brake lights were out. The trial court allowed his vehicle's dashboard camera video to be admitted into evidence and published to the jury.

On the videotape, the jury heard Mother and Father explain to the officer that they were homeless and were driving to Denton to spend the night there before their visit with B.O. and their permanency hearing the next day. Mother told Officer Wrobel, "We could lose our daughter." Early on in their interaction, Mother, who had been driving the vehicle, also told the officer that they were convicted felons with poor credit and that she had a prior conviction for driving without insurance. After further checks, Officer Wrobel discovered that even when the vehicle had insurance, Mother and Father had been excluded from coverage as drivers. Even though Mother begged him not to arrest her because she was on probation, Officer Wrobel arrested Mother "on a Class B," for driving without a license and without insurance.

As soon as Officer Wrobel placed Mother in handcuffs, she dropped to the ground and started beating her head on the pavement while Father leapt from the vehicle with his cell phone, holding it in a manner that indicated he was trying to record everything. Mother started praying and spoke in tongues while she was dragged to the police vehicle and placed in the back seat.

Father told the officers that their vehicle had bed bugs and that every time he had been taken to jail, police had had to take him to Green Oaks, which he explained was a mental hospital. One of the officers asked him, "Do you need to go to Green Oaks tonight?" Father replied, "If y'all are taking me to jail, I will." He also told them that if they impounded his vehicle, he would need to panhandle

in the morning. Father then told them about C.'s dying two years before from co-sleeping and SIDS.

Officer Wrobel asked a paramedic to check Mother's head for injuries, and Mother told the paramedic that she was going to kill herself if she was taken to jail. While Mother was in the back seat of the police vehicle, she started hitting her head on the window, leading one of the officers to ask her if she wanted to be hog-tied. Mother replied, "I want to die." She also requested a padded room.

Like Father, Mother threatened that if their vehicle was impounded, they would have to panhandle because they had no money. During Mother's trip to the Denton County Jail in the back of the police vehicle, she lectured Officer Wrobel on religion and threatened him with hellfire.

In addition to the dashboard recorder, the police vehicle was also equipped with a videorecorder for the back seat. From the back seat recording, the jury could observe that while handcuffed, Mother unlatched her own seatbelt, contrary to her assertion to the police that the paramedic had done it.

During cross-examination, Officer Wrobel said that no drugs or alcohol containers were found in Mother and Father's vehicle and that he did not smell alcohol or marijuana on anyone inside it.

(2) Mother's and Father's Erratic Behavior in the Case and Trial

The record is replete with Mother's and Father's odd behavior in front of the jury during voir dire and trial. For context in our review of the trial court's

decision to restrict their access to B.O., we include this additional summary of their behavior before and during trial, within and outside of the jury's presence.

At the initial adversarial hearing in January 2016, the trial court mentioned to the parties that its ruling to keep the child in foster care was "in large part predicated on [its] in-court observation of the two parents." At the February 2016 status hearing, when the CASA volunteer opined that visits should remain at the Denton office for the child's convenience and safety, Mother remarked aloud, "Convenience of the child. The child's a newborn." At the conclusion of the February 2016 hearing, the trial court reiterated to the parents that it had appointed competent counsel for them and to bear that in mind in light of some of the conduct it had "observed again here today."

At the first May 2016 hearing, Mother's original appointed counsel sought to withdraw on the basis that communication had broken down between them. Mother's attorney also cited as additional problems between client and counsel: Mother's threat to sue him in a federal lawsuit that she was preparing and her demand that he engage in conduct that he considered legally frivolous and ethically prohibited. Mother, on the other hand, complained that her counsel had provided ineffective assistance to her. She asked the trial court if it was "above Texas Family Code" because in her opinion, the standard for conducting an emergency removal before obtaining a court order had not been met. Mother later explained that she was dissatisfied with her counsel because he had

refused to file a petition for mandamus against the judge for illegally seizing her child.

Father's counsel also sought to withdraw, stating that the grounds for withdrawing were identical to those of Mother's counsel. DFPS's counsel informed the trial court that based on DFPS's experience with Mother and Father, the same pattern would repeat with new appointed counsel. After cautioning Mother and Father more than once not to interrupt anyone, the trial court opted to appoint new counsel for each. The trial court also learned at this hearing that Mother and Father had sent harassing texts and made threats to the CASA volunteer and that charges had been filed.

At the second May 2016 hearing, the trial court began the hearing with a caution to Mother and Father not to interrupt. CASA requested that visitation be suspended because of the parents' erratic behavior, threats, and possible bed bug infestation. Mother said that she had told the CASA volunteer that she could be a part of Mother's federal lawsuit. Mother opined that the CASA volunteer was a little sensitive, did not like Mother, and did not like Bible verses. Mother denied having threatened to have the foster parents arrested for kidnapping, but Father admitted that he had sent such a text and then winked at the judge.

At the July 2016 hearing on whether the child could be immunized, when the trial court announced that it would grant the right to immunize B.O., Mother interjected, "You are trampling my constitutionally [sic] parental rights by doing so." The trial court reminded her that it had cautioned her about making

outbursts and not to interrupt. Mother then threatened that she would file a mandamus. Mother and Father interjected that their lawyers had not asked them the questions they wanted the lawyers to ask and complained about unfairness.

At the September 2016 permanency hearing, the trial court reminded Mother that she had to allow the district attorney to finish asking questions and observed, "Miss, each hearing we've had this issue." The trial court recessed the hearing for three hours, making it apparent on the record that the hearing would resume at 3:00 p.m., but Mother and Father opted not to attend when the hearing reconvened.

Before the first day of trial began, Mother's counsel related a text message from Mother and Father that stated, "Again, fair warning, all suits federal and personal against [DFPS], CASA, the judge, attorneys can be avoided by speedy return so that we may celebrate our daughter's birthday." Mother's counsel also related that Mother had told him that it was her case and her trial and that he was to take no active part except for possibly some cross-examination. Father's counsel stated that Father had taken the same position and had sent similar text messages. Mother attempted to interrupt, and the trial court reminded her, "And first rule, no interruptions. You're going to get your point in here in a minute." Mother then informed everyone, "We will be doing federal and personal lawsuits for all involved. If our child's returned before her birth date, none will be done. All will be forgiven, and blessings will come out of this mouth and pray in the name of Jesus for you all." Father added, "All of y'all."

The trial court elected to consider Mother's and Father's appointed counsel as standby counsel and to allow them to proceed pro se with the right to consult with their counsel and to have their counsel intervene at any point. Mother and Father both agreed with this decision.

The trial court then asked Mother and Father if they had been advised about their Fifth Amendment privilege, and Father asked, "What is the Fifth Amendment?" The trial court explained about the right to remain silent and to refuse to answer a question that might have the potential to incriminate. After the trial court explained waiver, Father said that it sounded "like a trick question." The trial court explained again that if he was testifying and was asked a question, he could assert the Fifth Amendment right and refuse to answer the question but that if he answered the question, then it would be assumed that he waived his right to assert the Fifth Amendment. Father said that he thought he understood, and Mother stated that she understood.

However, the same information had to be re-explained to Father before he testified. After a break to allow Father to consult with his standby counsel and Mother, his standby counsel put the following on the record:

> [Counsel]: Yes. I was attempting to explain my client's Fifth Amendment privilege to him. I asked him if he understood it, and he said no. And then the mother redirected his attention and said that, "You know everything you need to know, and you don't need to listen to her anymore because she's trying to scare you."
>
> And I asked him specifically if he understood what implication of your Fifth Amendment right means, and he specifically told me no.

[Mother]: He's not trying to revocate [sic] his rights.

. . . .

[Father]: What's the question?

[Counsel]: I asked if you understood your Fifth Amendment privilege, and you said no.

[Father]: I don't, don't understand it. I don't - -

[Mother]: Your Fifth Amendment right is per question that you are asked - -

THE COURT: No, ma'am. Ma'am - -

[Mother]: - - on that stand you can say, "I plead the Fifth." Don't do it. If you don't know the question, "I don't know. I don't recall."

[Father]: Okay.

[Mother]: That's it. That's all. We're done. He understands. We're good.

THE COURT: Ma'am, it's not you. You need to go sit down now.

[Father]: Just relax.

THE COURT: You need to go sit down.

[Mother]: You don't need to be up here with them, [Father].

THE COURT: Ma'am, you need to go sit down.

[Father]: Go sit down for a minute.

THE COURT: Ma'am, I'm telling you now, go sit down.

[Mother]: I'll say it again before you go in there. Remember what I said, "I don't recall. I don't remember." You don't need to plead the Fifth.

THE COURT: Go back on the stand.

[Mother]: If you plead the Fifth, they are going to look at you badly. Don't do it.

THE COURT: Sir - -

[Father]: Yes, sir.

THE COURT: And I think it was explained by [Mother's counsel] - - we had this discussion at the outset of the case that there are allegations which could potentially - - relating to the death of the child as well as maybe other matters, that could result in a criminal prosecution.

[Father]: Right.

THE COURT: You have the right to invoke the Fifth Amendment privilege as to anything that you think might incriminate you - -

[Father]: Okay.

THE COURT: - - by saying, "I'm not going to answer that because I'm invoking my right to remain silent."

[Father]: Okay.

THE COURT: Okay. Probably one of - - a lot of people understand that. It's the next one. This is a civil case. When you do that, the jury does have the ability to make an inference that if you were to respond it would be bad, a bad response for you.

[Father]: So - -

THE COURT: That is - - so the question I have for you - -

[Father]: Yes, sir.

THE COURT: - - is: Are you going to invoke your Fifth Amendment right or not? Because we just need to know because then I'll explain the process to you.

[Mother]: You want the ability to.

[Father]: I want the ability to.

THE COURT: Invoke it on a question-by-question basis?

[Mother]: Yes. Say "yes."

[Father]: Yes.

THE COURT: Ma'am, you need to be silent. This is his - - it's his determination, not yours. That's fine. Then take the stand.

[Mother]: Say yes. [Father], do not allow them to confuse you.

THE COURT: Take the stand, and then I will allow [your standby counsel] to invoke it any time . . . she thinks it's appropriate to do so, and you can choose to answer or not answer on a question-by-question basis.

During voir dire, when DFPS's counsel asked whether the venire panel thought that DFPS removed children just because parents are homeless, Mother interjected, "Yes, they did." DFPS's counsel then asked, "Do you think that's the only thing that can be going on, and that's the reason we're removing?" Mother restated, "That's what they did."

After the trial court informed DFPS's counsel that she had used an hour and ten minutes of her allotted two hours, Mother objected, accusing the trial court of giving DFPS more time than Mother had been allotted and stating, in the presence of the jury,

That's unfair. That is unfair, Judge. You've been unfair this whole entire year.

> That's why I have y'all -- he puts himself above Texas Family Code. He's above the law, y'all. That's why y'all are here, so y'all can decide. And I know we have to be submissive to this man here. That's why I have y'all here, because he's an unfair judge. And, y'all, I hope that you will be fair with me.

During a break, the court reporter calculated how long DFPS had conducted voir dire and informed the parties that DFPS still had forty-seven minutes remaining.

During the second day of the November 2016 trial, Father became distressed during Dr. Schoppe's autopsy explanation, and the trial court had to caution both parents not to interrupt the trial with verbal outbursts. When one of the officers who investigated C.'s death testified about Mother and Father's trailer during the investigation of C.'s death, the trial court again had to caution Mother that there were to be no verbal outbursts. During a recess immediately following one of Mother's outbursts, the trial judge informed her that she was being held in direct contempt in light of the three separate warnings she had been given to have no verbal outbursts and that he would assess her punishment at the case's conclusion after considering her conduct through the remainder of the trial.

The trial court also received a report that day that Mother and Father were "preaching the word of God on the front steps" of the courthouse and might have approached a juror. Mother denied that they had approached any jurors, and Father added, "That we didn't know of." Mother interrupted the trial judge to clarify that Father had been in the parking lot, not on the front steps. Later, when one of the witnesses asked if the attorney could repeat a question, Mother

interrupted the exchange and directly instructed the witness to "[a]sk her to read it back," apparently referring to the court reporter.

On the third day of trial, outside the jury's presence, Mother and Father accused the court and DFPS of having stacked the jury against them by including county employees in the jury pool, and they again claimed that they had been treated unfairly because they were poor. Father stated, "You guys have all the money. We're poor." Mother added, "You bring the two poorest people from another county into your county. You put them up against all three rich hoity people. We don't look like y'all." After overruling their pro se objection "to the alleged jury impanelment," the trial court observed,

> I will note that the tenor and demeanor of - - during this preliminary proceeding, which was outside of the presence of the jury, was very aggressive and hostile. And it's the type of behavior that if done in the presence of the jury - - I want to make certain you all understand this - - could result - - I've already found the wife in contempt and said I was going to judge at the conclusion of this trial the punishment that would be assessed, if any. So I caution you.
>
> And now, sir, I caution you, because you engaged in the same type of conduct, that you can certainly assert your rights, I appreciate that, but there is a way to do it.

Mother complained that the trial court only treated them respectfully in front of the jury and was rude to them outside of the jury's presence.

Over the course of the third day of trial, particularly before Father testified, and on the fourth day of trial, Mother continued to interject, and the trial court repeatedly cautioned her. At one point, the trial court said, "Ma'am, now I think it's - - we're up to the fourth or fifth time. So you need to stop making the

comments on the record where everyone can hear them. I'm instructing you affirmatively to stop."

e. Mother's and Father's Testimonies

Mother opted to conduct her own cross-examination of Father. She asked him whether he had read the Bible that morning, and when he replied that he had, she asked him to read from it, which drew an objection to relevance that the trial court sustained. Undeterred, Mother asked him again to read aloud the section of the Bible they had read that morning, drawing the same relevance objection. Mother posed the same question a third time, drawing yet another relevance objection, at which point Mother responded, "Really? It's very relevant, [counsel]. Please don't do this what you're doing to us right now." The trial court sustained the objection. Ultimately, however, the objections ceased, and Father managed to read several pages of the Bible to the jury before the trial court interrupted to ask the court reporter whether she was "able to put down when they're standing or gesticulating." She indicated that she had not been, so the trial court made the record reflect that Father was standing, waving his arms, and stamping his feet.[18]

At Mother's probing, Father testified that Mother and D.M. had been friends but that after DFPS became involved, they hated each other. He further

[18]Father stated, "It's what I do when I read. I get zealous."

testified that before C. died and DFPS became involved, Mother and S.M. had been "chief friends" but were now separated. The following dialogue ensued:

> [Mother]: Do you see commonality with those two relationship destructions?
>
> [Father]: I see all kinds of relationships being broken.
>
> [Mother]: So it is not safe to say that at least in our lives [DFPS] has done nothing but destroy family bonds with no concerns of the effects on the child?
>
> [Father]: Yes.
>
> . . . .
>
> [Mother]: [Father], you gave some testimony - - you've been giving testimony about child support. Is it that you just don't want to pay child support, or the funds aren't there?
>
> [Father]: I had a really good job before I went to prison, y'all.
>
> [Mother]: Unresponsive . . . . [Father], is it that you don't want to pay or that you don't have the money?
>
> [Father]: I want to pay. I don't have the money.
>
> [Mother]: Is it not true that the majority of your past child support piled up on you while you were in jail?
>
> [Father]: While I was in prison.
>
> . . . .
>
> [Mother]: Do you think you are of sound mind?
>
> [Father]: I am of sound mind.
>
> [Mother]: Do you think I am of sound mind?
>
> [Father]: That woman is of sound mind.

[Mother]: Have you ever been diagnosed with any kind of mental disorder?

[Father]: No, ma'am.

[Mother]: Why didn't you do the services?

[Father]: I don't need them.

. . . .

[Mother]: Would you agree that [DFPS] continues to try to make the both of us look and seem crazy?

[Father]: It's appearing that way.

. . . .

[Mother] Was that not a choice, an unselfish choice to leave your child [R.] at your mother-in-law's house so that you could become stable?

[Father]: Sounds like a very unselfish choice.

[Mother]: And would that not be looking out for the best interest of your child?

[Father]: Sounds like it's the best interest of the child. I'm not able to care for you, so go to your mother-in-law's [sic]. Now I'm able to care for you. Now come home, son. Let's rejoice now.

. . . .

[Mother]: Do you believe you've been given a fair trial?

[Father]: No.

. . . .

[Mother]: Do you love me?

[Father]: I love you, Baby.

[Mother]: Do I love you?

[Father]: I think you do. Do you love me?

[Mother]: Yes. Do you love God?

[Father]: I love Him more than you. Sorry.

. . . .

[Mother]: Is it not your understanding that there is another option for the jury and that the - - we could be managing conservatorships [sic], and the judge could make a[n] order for us to have the child back with supervision of some sort? Is that an option as well, besides just termination for this jury here?

[Father]: Yes, ma'am.

[Mother]: Before [R.] was removed, would you describe his behavior as a feral cat?

[Father]: No. . . . He became feral after he was stripped from us bear-hug style by the [DFPS] people.

During DFPS's redirect, and over several relevancy objections interposed by Mother, DFPS's counsel elicited testimony from Father about his concerns about cell phones and electromagnetic rays from "GWEN" towers. Father elaborated,

> The GWEN towers that are set up all around our cities - - the acronym is GWEN, G-W-E-N. It means ground wave emergency network. Please, everybody, if you have phones, pick them up and Google and read, y'all. We are all in trouble. Those cell phone towers are not cell phone towers, y'all. Some may be. Okay? But you look at the gauge of wire running up those towers, that's transmission output. We're talking scaler waves. We're talking invisible energy, guys. It is true. Okay? You know your remote control cars? You're able to remote control that car over there, right? That's invisible energy. You're able to control it, nothing connected. That's basically what's going on with the GWEN towers.

> Don't take my word for it. Just Google it yourself and read. That means everybody. Okay. Them [sic] towers, look at topographic map. You know what a topographic map . . . [if] you look at the situation on the - - this is for all of us. . . . . If you look at the towers, they are situated - - if you look at your topographic map of Denton, just look at it. Look at the underground mapping system of underground water waves, and look where the towers are set up. They're set up on fault lines.

Father hypothesized that so many "24/7 cares" had been built in anticipation of sickness caused by the GWEN towers and asked the jury to Google it.

Father acknowledged that he was told how important the service plan was. Mother said that the orders in this case "were unneeded for [her] life." As to not working her service plan, Mother said that if DFPS had offered services that she needed, she would have worked them. When asked what services she thought she might have been able to benefit from, Mother replied,

> I don't know. What - - you have to give me an example. Obviously not drug counseling, that I don't need. Obviously not abusive counseling that I don't need. Obviously not healthy relationships that I don't need. If you had offered me a service that I could hear about that I needed, I'd let you know.

Mother also suggested that DFPS should have offered them financial assistance, "the money help."

f. Mother and Father's Financial Instability

Mother and Father did not contribute financially to R.'s care. Instead, they sought financial support for themselves from S.M. The most recent request S.M. could recall was Mother's sending her photos of purses in October and asking, "I know you like purses. Would you buy one of these from us? We need money."

S.M. said that she received requests for money or other support from Mother and Father once every few months but only received requests to have R. come home approximately once a year.

Father testified that his average monthly income was a little over $2,000 from his tree-trimming business. Father said that he used to burglarize homes but that he "learned a new way when [he] saw people holding a cardboard sign and [he saw] that they were not going to jail but they were able to get their daily food that way." He saw someone else do it, so then he started doing it and brought in $1,150 in one day after holding a sign on the side of the road that said, "Anything helps. God bless."[19] Father said he would tell people about being homeless, about C.'s death, about R.'s not living with them, and about B.O.'s removal. Father said that he and Mother smoked a pack of cigarettes between them per day, which cost them $5 per day.[20] Father also said that his driver's license had been suspended for ten years.[21]

Father was not licensed and bonded for his tree-trimming service. Mother testified that the tree service was licensed in her name but not incorporated and

[19]During Mother's cross-examination of him, Father agreed that making that much from panhandling on a street corner was rare and that he usually garnered $20 to $25 in an hour.

[20]Father said that he understood how much money it took to feed his smoking habit and that if he had to, he would stop smoking.

[21]Father stated that to get his license reinstated, he would need to pay over $10,000 worth of fines that had accumulated.

that prayer was their insurance policy. Mother said that their profits and expenses for the business were "evening out to the point where [we] don't need to pay taxes," so she had not filed any tax returns for the business and had not filed her personal tax returns since the year before trial. Mother said that she knew of several daycares where she could drop off B.O. if she needed to, which cost from $20 to $60 per day, and she knew about "all of the resources around town to go to get free diapers, free clothing, free children's food."

After averaging the tree service's invoices over five months revealed that the business's monthly income was around $1,390, Mother acknowledged that during the same time period when she was claiming she was stable and had a secure income, she had been arrested for panhandling. The trial court admitted a photograph of Mother panhandling near an overpass. When asked why she sent the photo to S.M., Mother said, "Make her feel bad, to be honest."

Father said that he and Mother had no savings and he was "completely broke" because he had been unable to work while attending the trial. They were also a few days behind on their rent for the trailer home's lot. Mother acknowledged that she had not been paying her probation fees, but when DFPS's counsel asked her if she realized that her probation could be revoked for nonpayment, Mother said, "It's very, very unlikely for any county to revoke you for nonpayment. [Father] just completed with nonpayment." Although Mother was qualified to get a job in the restaurant business, she said that she did not want one because "[i]t's very stressful." Mother nonetheless said that when she

needed employment to supplement their income, she would work at a restaurant. Mother also explained, "I've applied for many jobs throughout this whole process. I am a convicted felon with only cashier and manager experience, and my felonies are theft and they don't want me on a register. So I am self-employed for that reason at this time." Mother stated that, with regard to food stamps and other benefits, she only applied for services that she needed so that she was "not taking advantage of the State."

Stone testified that parents were supposed to pay before a visit at Hannah's House, but when they arrived without the ability to pay, Hannah's House would allow the visit to continue to avoid disappointing the child. Hannah's House would allow the parents to "float" the payment but would not schedule another visit until the previous visit had been paid for. Stone said that of Mother and Father's twenty-three visits, they had floated three to five times but had always managed to catch up. Hannah's House had also been able to reduce their per-visit payment to $35 in June 2016.

g. DFPS's Position at Trial

Schuler testified that DFPS's position was that Mother and Father had endangered B.O. and failed to complete the court-ordered service plan and that terminating their parental rights would be in B.O.'s best interest. Schuler further testified that DFPS did not believe that a conservatorship position for Mother and Father would be in B.O.'s best interest "[d]ue to the past history and lack of progress on the service plan . . . they consciously did not try to alleviate the

concerns that [DFPS] had." Schuler said that D.M. was interested in adopting B.O. and was not interested in sharing conservatorship of B.O. with Mother and Father, in two-times-a-month visits, in phone calls, or in any contact. In fact, Harrison elaborated that D.M. had told her that based on the parents' change in demeanor, she believed it would be in B.O.'s best interest to not have any relationship with them.

5. Closing Arguments

During closing arguments, DFPS argued that Mother and Father had endangered B.O. beginning with deliberately conceiving her during their unstable housing and employment situation just months after C. died, that they had both not simply failed to comply with their service plans but instead had deliberately refused to comply with the court's order, that terminating their parental rights would allow B.O. to continue to enjoy stability in her life, and that not terminating their rights would subject B.O. to being "carted around like a rag doll and used to get money from panhandling or for jobs."

Father's standby counsel argued that the jury could not predict what the future would be, that the parents still had their rights to R., that being poor did not make them bad or unfit parents, and that DFPS had been out to get them since C. died, and she urged the jury to judge the credibility of the witnesses, particularly S.M.'s testimony about R. in comparison to Stone's. And she argued that B.O. had never been abused or neglected by her parents.

Mother's standby counsel reminded the jury that Mother had said that when they did well with their tree-trimming business, they did not need or apply for government assistance. He argued that the State had overreached in this case in its means-justifies-ends pursuit, that the parents were being punished for being underemployed, and that S.M. had lied about R.'s behavior.

B.O.'s ad litem attorney reminded the jury that Father had eight children but was raising none, that Mother had had three children and none of them were with her, that the pathologist had testified that Mother's excuse for C.'s skull fracture was not credible, and that Mother and Father had a propensity towards crime, from felony burglaries, to driving with a suspended license and not having insurance, to not paying child support and their probation fees. He also reminded the jury about the dashboard camera video that showed Mother beating her head on the concrete and asked, "What example is that for a child?" He stated, "There's too much information that shows how bad of parents these would be to keep on even talking about it." He referred the jury to the adage that actions speak louder than words and pointed out that the jury had seen "lots of actions" by Mother and Father during the trial.

6. Non-Unanimous 10–2 Jury Verdict

The jury reached a 10–2 verdict. The jury declined to find that Mother and Father had endangered the child but found that they had failed to comply with the court's order setting out the actions necessary for the child to be returned to them. The jury also found that it would not be in B.O.'s best interest to terminate

Mother's and Father's parental rights but nonetheless found by a preponderance of the evidence that it would significantly impair B.O.'s physical health or emotional development if Mother and Father were to be appointed the child's managing conservators. The jury instead recommended that they be appointed as the child's possessory conservators.[22] The jury was not asked about anyone else who should be appointed managing conservator, and no one objected to that portion of the charge, although there was some discussion about it during the charge conference.[23]

After the verdict was read, the trial court ordered DFPS to remain the child's temporary managing conservator until the issues relating to the jury charge were worked out. Once the jury was dismissed, the trial court informed Father that if he had not taken care of his warrants by the following week's

---

[22]The charge instructed the jury as follows,

> A parent who is not appointed managing conservator shall be appointed possessory conservator unless possession of and access to the child by that parent is not in the best interest of the child and would endanger the physical or emotional welfare of the child. . . .
>
> You should appoint a parent (whose parental rights have not been terminated and who has not been appointed managing conservator) as possessory conservator unless you find from a preponderance of the evidence that possession or access by the parent is not in the best interest of the child and that such access would endanger the physical or emotional welfare of the child.

[23]Ultimately, the trial court observed that if the jury named both parents as possessory conservators, the trial court would deal with the managing conservatorship issue at that time.

conservatorship hearing, he should "not expect to leave this courthouse." The trial court initially ordered Mother confined to jail for seventy-two hours, effective immediately, as her punishment for direct contempt but in light of Mother and Father's financial situation, modified the order for Mother to report on the Monday after Thanksgiving at 9 a.m. to serve her three-day sentence.

D. Post-Trial Motions and Hearings

Mother and Father filed separate motions to amend, modify, or strike some of the jury's findings to leave only the finding of "no termination" and to return B.O. to them. DFPS filed a motion to enter a final order appointing it as managing conservator and attached to its motion its written consent to be appointed B.O.'s managing conservator. Father did not attend the hearing. At the conclusion of the hearing, the trial court ruled that DFPS would be the managing conservator and that B.O. would remain with D.M. in New York, explaining that with regard to rule of civil procedure 279,

> [A]fter I viewed this thing, believe me, very carefully, the ruling I just made is the only way - - and I understand its obligations under the case law - - to the extent when you have these type[s] of verdicts to synthesize the findings in a way that they do not directly conflict. This is the only ruling that does that. I can't think of any other option other than throwing the verdict out and trying this thing all over again, which at least at this point awaiting entry of the judgment and any additional motions and arguments, I'm not willing to do at this point. I could be after I hear any motions for new trial, if there are any.

The trial court held a hearing on December 6, 2016 on DFPS's motion to enter the final order. Father did not attend the hearing; Mother said that he was

"on other business." The trial court acknowledged a potential problem regarding DFPS's after-the-fact written consent:

> [A] good appellate lawyer might say, well, any evidence is to be submitted before the close of the jury argument for submission to the jury. And I'm not supposed to consider the consent, and if I did, I committed fundamental error. So it's there in the record. I'm glad it's there in the record because it confirms what was going to be my finding anyway. I will go that far. But I will tell you, independent of the written consent, I think that's the only way to resolve what the jury charge - - what the jury said. How can they name them possessory conservator and leave a blank - - we have a blank as to the managing conservator?

Because the jury affirmatively refused to make the parents B.O.'s managing conservators, the trial court "was left in a dilemma of having to fill a hole." Because D.M. had not intervened as a party, the trial court said she was technically not before the court, but because the placement with D.M. was in B.O.'s best interest, "[t]he only way to get her to stay in that current placement is to have [DFPS] in."

E. Findings of Fact, Conclusions of Law, and Final Judgment

In its December 6, 2016 findings of fact and conclusions of law, the trial court adopted the jury's finding that appointment of Mother and Father as B.O.'s managing conservators would not be in her best interest because such an appointment would significantly impair her physical health or emotional development. The trial court found that Mother should have only supervised visitation because of her "erratic behavior," including her behavior at the time of trial, along with her history of homelessness, lack of job stability, and having

given up managing conservatorship rights to another child. The trial court likewise found that Father should have only supervised visitation because of his

> erratic behavior, including behavior at time of trial, from inception of voir dire to conclusion of closing statements, criminal history, history of homelessness, lack of job stability as demonstrated by history of panhandling and theft, father's history of not providing adequate support to many other biological children, and giving up managing conservatorship rights to other children.

The trial court also found that DFPS had pleaded for permanent managing conservatorship and had filed a written consent to be named B.O.'s managing conservator. It further determined that the only way the child could remain in the New York placement was if DFPS was appointed as managing conservator.[24] And it concluded that restrictions should be placed on Mother's and Father's right of access to the child.

In its December 6, 2016 final judgment, the trial court appointed DFPS as B.O.'s permanent managing conservator and appointed Mother and Father as her possessory conservators. In an attachment to the judgment, the trial court set out that Mother's and Father's possession and access to B.O. as consisting of "[s]upervised electronic visitation (Facetime or similar program) once a week on Sunday beginning at 7:00 p.m. Texas time for 15 minutes," along with in-person supervised visitation in New York "by a court approved supervisor or supervisory facility on the third Saturday of the month from 1:00 p.m. until 5:00

[24]At the hearing, the trial court explained, "Because in this particular case, given the interstate placement of the child, I think [DFPS] has to be in the case."

p.m. New York Time," provided that B.O.'s DFPS caseworker was notified by 5:00 p.m. Texas time on the first day of the month about the intention to exercise in-person visitation. Mother and Father would be responsible for securing payment for the supervision in advance and for providing proof of payment to DFPS by the first day of the month of the proposed visitation. "Failure to properly notify [DFPS] of [the] intent to visit and provide proof of payment will cause that month's visit to be forfeited." The trial court also ordered each parent to pay $225 per month in child support.

Mother's and Father's counsel filed a motion for new trial complaining of the sufficiency of the evidence to support the trial court's findings (1) that DFPS should be appointed the child's permanent managing conservator, (2) that appointment of either or both parents as managing conservator would not be in B.O.'s best interest or would significantly impair her physical health or emotional development, (3) that appointment of a relative or another person as managing conservator would not be in B.O.'s best interest, and (4) that Mother's and Father's access should be limited to one fifteen-minute phone call per week and one four-hour supervised visit per month in New York. As to the jury charge, Mother and Father also complained about the denial of their right to trial by jury and their due process rights.

III. Standard of Review and Applicable Law

When a trial court determines issues related to conservatorship and possession of and access to a child, its primary consideration must be the child's

best interest. Tex. Fam. Code Ann. § 153.002 (West 2014); *see id.* § 153.001(a)(1) (West 2014) (stating that Texas's public policy is to assure that children will have frequent and continuing contact with parents "who have shown the ability to act in the best interest of the child").

A. Abuse of Discretion

Trial courts have broad discretion to determine what is in the child's best interest.[25] *In re P.M.*, No. 02-14-00205-CV, 2014 WL 8097064, at *30 (Tex. App.—Fort Worth Dec. 31, 2014, pet. denied) (mem. op. on reh'g). A trial court abuses its discretion if it acts without reference to any guiding rules or principles, that is, if the act is arbitrary or unreasonable. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007); *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004). A trial court also abuses its discretion by ruling without supporting evidence. *Ford*

[25]The supreme court has addressed the distinction between the evidentiary standard applicable to termination of parental rights and that of conservatorship appointments, explaining that due process compels that termination decisions must be supported by clear and convincing evidence because terminating the parent-child relationship imposes permanent, irrevocable consequences. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). In contrast,

> a finding that appointment of a parent as managing conservator would significantly impair the child's physical health or emotional development is governed by a preponderance-of-the-evidence standard. These differing proof standards, in turn, affect the method of appellate review, which is more stringent for termination decisions than for those regarding conservatorship. . . . Conservatorship determinations . . . are subject to review only for abuse of discretion, and may be reversed only if the decision is arbitrary and unreasonable.

Id. (citations omitted).

Motor Co. v. Garcia, 363 S.W.3d 573, 578 (Tex. 2012). But an abuse of discretion does not occur when the trial court bases its decision on conflicting evidence and some evidence of substantive and probative character supports its decision. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002) (op. on reh'g). And an appellate court cannot conclude that a trial court abused its discretion merely because the appellate court would have ruled differently in the same circumstances. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995); *see also Low*, 221 S.W.3d at 620. An abuse of discretion is not shown if a court reaches the right result, but for the wrong reason. *In re J.M.*, No. 07-15-00438-CV, 2016 WL 6024279, at *2 (Tex. App.—Amarillo Oct. 13, 2016, no pet.) (mem. op.); *Chenault v. Banks*, 296 S.W.3d 186, 190 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Legal and factual sufficiency are not independent grounds of error in conservatorship cases but are relevant factors in deciding whether an abuse of discretion occurred. *In re L.W.*, No. 02-16-00091-CV, 2016 WL 3960600, at *2 (Tex. App.—Fort Worth July 21, 2016, no pet.) (mem. op.). To determine whether the trial court abused its discretion because the evidence was insufficient to support its decision, we consider whether the trial court (1) had sufficient evidence upon which to exercise its discretion[26] and (2) erred in its

[26]We may sustain a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact, (2) the court is barred

exercise of that discretion. *Id.* We conduct the applicable sufficiency review with regard to the first question. *Id.* We then determine whether, based on the elicited evidence, the trial court made a reasonable decision. *Id.*

---

by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998), *cert. denied*, 526 U.S. 1040 (1999). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). Anything more than a scintilla of evidence is legally sufficient to support the finding. *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996); *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996).

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

Absent an objection to the jury charge, the sufficiency of the evidence is reviewed in light of the charge submitted. *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 221 (Tex. 2005) (citing *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001)). In a jury trial, a trial court may not render an order in contravention of the jury's findings. *In re B.L.M.*, No. 02-07-00214-CV, 2008 WL 1867141, at *9 (Tex. App.—Fort Worth Apr. 24, 2008, no pet.) (mem. op.) (citations omitted).

B. Best Interest Considerations

Nonexclusive factors that the trier of fact in a termination case may use in determining the best interest of the child include the following, which were included in the jury charge here,

> (A) the desires of the child;
>
> (B) the emotional and physical needs of the child now and in the future;
>
> (C) the emotional and physical danger to the child now and in the future;
>
> (D) the parental abilities of the individuals seeking custody;
>
> (E) the programs available to assist these individuals to promote the best interest of the child;
>
> (F) the plans for the child by these individuals or by the agency seeking custody;
>
> (G) the stability of the home or proposed placement;
>
> (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
>
> (I) any excuse for the acts or omissions of the parent.

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976) (citations omitted). The jury found that terminating Mother's and Father's parental rights to B.O. would not be in B.O.'s best interest.

We consider the above factors as to a child's best interest in conservatorship, possession, and access decisions. *See In re D.M.*, No. 02-16-00473-CV, 2017 WL 1173847, at *1 (Tex. App.—Fort Worth Mar. 30, 2017, no pet.) (mem. op.) (citing *Holley* and family code section 263.307 with regard to

making a conservatorship best-interest determination).[27] These factors are not exhaustive, and some listed factors may be inapplicable to some cases. *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002).

Further, in suits affecting the parent-child relationship, there is a rebuttable presumption that a standard possession order, as outlined in the statute, is in the best interest of the child, but a court may deviate from the terms of the standard order if those terms would be unworkable or inappropriate and against the child's best interest. *See* Tex. Fam. Code Ann. §§ 153.252–.253 (West 2014). The terms of an order that denies possession of a child to a parent or imposes restrictions or limitations on a parent's right to possession of or access to a child may not exceed those that are required to protect the best interest of the child. *Id.* § 153.193 (West 2014).

With regard to a child less than three years old, the trial court shall consider evidence of all relevant factors, including: the caregiving provided to the child before and during the current suit; the effect on the child that may result from separation from either party; the availability of the parties as caregivers and the willingness of the parties to personally care for the child; the physical, medical, behavioral, and developmental needs of the child; the physical, medical,

[27]The factors in family code section 263.307 pertain to the review of placement of children under DFPS's care. Tex. Fam. Code Ann. § 263.307 (West Supp. 2016). Under this section, the prompt and permanent placement of the child in a safe environment is presumed to be in her best interest. *Id.* § 263.307(a).

emotional, economic, and social conditions of the parties; the impact and influence of individuals, other than the parties, who will be present during periods of possession; the presence of siblings during periods of possession; the child's need to develop healthy attachments to its parents; the child's need for continuity of routine; the location and proximity of the residences of the parties; the ability of the parties to share in the responsibilities, rights, and duties of parenting; and any other evidence of the best interest of the child. *See id*. § 153.254 (West 2014).

Further, in ordering terms other than those contained in a standard order, a court may consider (1) the age, developmental status, circumstances, needs, and best interest of the child; (2) the circumstances of the managing conservator and of the parent named as a possessory conservator; and (3) any other relevant factor. *Id.* § 153.256 (West 2014). The trial court may also place conditions on a parent's access, such as supervised visitation, if necessary for the child's best interest. *In re K.S.*, 492 S.W.3d 419, 429 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (citing Tex. Fam. Code Ann. § 153.004(e) ("It is a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or present child neglect . . . ."). We give wide latitude to a trial court's determinations on possession and visitation issues, reversing the court's decision only if it appears that the court abused its discretion in light of the record as a whole. *See In re S.A.H.*, 420 S.W.3d 911, 930 n.31 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex.

1982)); *see also In re A.J.I.L.*, No. 14-16-00350-CV, 2016 WL 6110450, at *5 (Tex. App.—Houston [14th Dist.] Oct. 18, 2016, pet. denied) (mem. op.).

C. Statutory Presumptions

There is a strong presumption that the best interest of a child is served by appointing a parent as managing conservator, but that presumption may be rebutted by showing that such an appointment would not be in the child's best interest because such an appointment "would significantly impair the child's physical health or emotional development." Tex. Fam. Code Ann. § 153.131 (West 2014); *see Lewelling v. Lewelling*, 796 S.W.2d 164, 166 (Tex. 1990) ("The presumption that the best interest of a child is served by awarding custody to a natural parent is deeply embedded in Texas law."). It is DFPS's burden to rebut this presumption. *A.J.I.L.*, 2016 WL 6110450, at *4. Family code section 263.404(a) uses the same standard for determining when a trial court may "render a final order appointing [DFPS] as managing conservator of the child without terminating the rights of the parent of the child." Tex. Fam. Code Ann. § 263.404(a) (West Supp. 2016).

To overcome the statutory parental presumption, the evidence must support the logical inference that some specific, identifiable behavior or conduct of the parent, demonstrated by specific acts or omissions, will probably cause significant impairment to the child's physical health or emotional development if the court appoints the parent as managing conservator. *In re M.L.*, No. 02-15-00258-CV, 2016 WL 3655190, at *4 (Tex. App.—Fort Worth July 7, 2016, no

pet.) (mem. op.). Acts or omissions that constitute significant impairment include but are not limited to physical abuse, severe neglect, abandonment, drug or alcohol abuse, or immoral behavior by the parent. *Id.* Other considerations may include parental irresponsibility, a history of mental disorders, frequent moves, bad judgment, child abandonment, and an unstable, disorganized, chaotic lifestyle that has and will continue to put the child at risk. *Id.*

IV. Permanent Managing Conservatorship

In their first issue, Mother and Father contend that the evidence is legally and factually insufficient to support the appointment of DFPS as B.O.'s managing conservator, and in their second and third issues, they argue that D.M., the aunt with whom B.O. was placed in New York, *could* have been named as managing conservator even though she was not a party and that she *should* have been so named under the statutory presumption in favor of relative placement. *See* Tex. Fam. Code Ann. § 263.404 (stating that the trial court can award managing conservatorship to DFPS without terminating parental rights if it finds (1) that appointing a parent as managing conservator would not be in the child's best interest *and* (2) that "it would not be in the best interest of the child to appoint a relative of the child or another person as managing conservator").

DFPS responds that the evidence at trial reflected that D.M. did not want to share conservatorship with Mother and Father and that appointing DFPS as the child's managing conservator was therefore in the child's best interest. DFPS further replies that the trial court did not err by appointing it as the child's

permanent managing conservator because this allowed DFPS to effectuate the jury's implied finding that B.O. should remain in her kinship placement with D.M. However, while DFPS asserts that the evidence was sufficient to appoint it as managing conservator, it acknowledges the trial court did so in part to make sure that the out-of-state placement continued with D.M., and it agrees in the alternative that D.M. could have been appointed B.O.'s managing conservator even though she was not a party.

Mother and Father argue that we should remand this case to the trial court so that D.M. can be appointed as the child's intended permanent managing conservator, and DFPS agrees as part of its alternative argument. However, as DFPS agrees only in the alternative in the body of its brief and requests affirmance of the trial court's judgment in its prayer, we must first reach the merits of whether DFPS could and should have been appointed B.O.'s managing conservator. *Cf.* Tex. Civ. Prac. & Rem. Code Ann. § 154.002 (West 2011) (setting out the state's policy to encourage peaceable resolution of disputes and special consideration to those involving issues of conservatorship, possession, and child support), §§ 154.021–.023, .071 (West 2011) (explaining mediation and the effect of a written settlement agreement); Tex. R. App. P. 42.1(a)(2)(A)–(C) (providing for voluntary dismissal in civil appeals by agreement and options for rendering judgment to effectuate the parties' agreements, remanding the case to the trial court for rendition of judgment in accordance with the parties'

agreements, or abating the appeal and permitting proceedings in the trial court to effectuate the parties' agreements).

Mother and Father argue that none of DFPS's witnesses testified that it would be in B.O.'s best interest for DFPS to be her managing conservator, and they complain that the only trial testimony linking DFPS to managing conservatorship is the following testimony by Schuler, B.O.'s DFPS conservatorship worker:

> [DFPS's counsel]: Is - - in any type of arrangement outside of termination, is [DFPS] willing to be joint managing conservator with [Mother and Father]?
>
> [Schuler]: No.
>
> . . . .
>
> [DFPS's counsel]: Is [D.M.] willing to be a managing conservator for B.O. with the parents having possessory?
>
> [Schuler]: No.
>
> [DFPS's counsel]: She's not a party to this case, correct?
>
> [Schuler]: That is correct.
>
> [DFPS's counsel]: So she can't consent or be appointed managing conservatorship, not being a party to this case, correct?
>
> [Schuler]: Correct.

Mother and Father argue that this evidence does not support the proposition that DFPS should be appointed managing conservator in the event of non-termination or provide evidence that such an appointment would be in B.O.'s best interest in the event of either termination or non-termination. And ignoring

the remainder of that section of testimony addressing D.M.'s unwillingness to be named managing conservator, they correctly point out that the evidence presented at trial supported D.M.'s suitability as managing conservator. They complain that the trial court erred by not appointing D.M. as managing conservator solely because she had not intervened.

As set out above in our factual recitation, the trial court determined that DFPS would be B.O.'s managing conservator so that B.O. could remain in New York with D.M. based on the fact that D.M. had not intervened as a party but also because DFPS had pleaded for managing conservatorship and had supported the pleading with its written consent post-trial. And the trial court had ample evidence sufficient to determine what course of action would be in B.O.'s best interest.

A. Interstate Compact on the Placement of Children

B.O. was placed with D.M. pursuant to the Interstate Compact on the Placement of Children (ICPC). *See generally* Tex. Fam. Code Ann. § 162.102 (West 2014). Under the ICPC, a "sending agency" means a party state or a party state's subdivision, officer, or employee thereof—DFPS or one of its agents—but as defined by the ICPC, a "sending agency" can also mean a court of a party state, among others. *Id.* § 162.102, art. II(b). The "sending agency"

> shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment, and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting, or is discharged with the

> concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law. The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement.

Id. art. V(a). The ICPC's provisions "shall be liberally construed to effectuate the purposes thereof." *Id.* art. X. The governor of Texas appoints DFPS's commissioner as compact administrator, who then designates a deputy compact administrator and staff necessary to execute the compact's terms. *Id.* § 162.106 (West Supp. 2016).

Because the plain language of the ICPC's terms would have allowed the trial court, as a "sending agency," to keep DFPS, also a "sending agency," in the case as managing conservator to handle the child's custody, supervision, care, and treatment, as a matter of law, the trial court could designate DFPS as B.O.'s managing conservator.

B. Other Family Code Provisions

Even notwithstanding the ICPC's plain language, other family code provisions also come into play as to the trial court's ability to appoint DFPS as B.O.'s managing conservator. In a termination suit, if the trial court does not order termination of the parent-child relationship, the court shall deny the petition or "render any order in the best interest of the child." *Id.* § 161.205 (West 2014); *T.L. v. Tex. Dep't of Family & Protective Servs.*, No. 03-14-00361-CV, 2014 WL 6845166, at *3 (Tex. App.—Austin Nov. 26, 2014, no pet.) (mem. op.). And as

pleaded alternatively by DFPS, "pursuant to §§ 153.005 and 263.404," if B.O. could not be permanently placed with a relative or other suitable person, then DFPS sought permanent managing conservatorship if (1) the parents' rights were terminated or (2) the parents' rights were not terminated and DFPS specifically consented in writing to being appointed permanent sole managing conservator. The trial court found that remaining in New York with D.M. was in B.O.'s best interest but was apparently under the impression that it could not make D.M. a permanent placement, i.e., that DFPS had to remain in the case to maintain the placement.[28]

Family code section 153.005 states that the trial court may appoint a sole managing conservator or joint managing conservators and that "if the parents are or will be separated, shall appoint at least one managing conservator." Tex. Fam. Code Ann. § 153.005(a)(1)–(2) (West Supp. 2016). It further provides that a managing conservator must be a parent, a competent adult, DFPS, or a licensed child-placing agency. *Id.* § 153.005(b). Under section 263.404, entitled "Final Order Appointing Department as Managing Conservator Without Terminating Parental Rights," a trial court may render a final order appointing DFPS as managing conservator of a child without terminating the rights of the

[28]In one of its fact findings, the trial court stated, "The child cannot remain in the current placement in New York unless [DFPS] is appointed as Managing Conservator." However, in its final judgment, the trial court merely stated that it would not be in B.O.'s best interest to appoint a relative or another person as managing conservator and appointed DFPS as her permanent managing conservator.

parent of the child if the court finds (1) that appointment of a parent as managing conservator would not be in the child's best interest because the appointment would significantly impair the child's physical health or emotional development and (2) that it would not be in the best interest of the child to appoint a relative of the child or another person as a managing conservator. *Id.* § 263.404(a). In determining whether DFPS should be appointed as the child's managing conservator under those circumstances, the court shall consider whether the child will reach 18 years of age in not less than three years; whether the child is twelve years of age or older and has expressed a strong desire against termination or has continuously expressed a strong desire against being adopted; and the child's needs and desires. *Id.* § 263.404(b) (West Supp. 2016).

The jury found that that it would significantly impair B.O.'s physical health or emotional development if Mother and Father were to be appointed the child's managing conservators, and the trial court adopted this finding. *See id*. § 153.131(a) (setting out that a parent shall be appointed managing conservator unless the court finds that such an appointment would not be in the child's best interest because it would significantly impair the child's physical health or emotional development). The trial court determined that it had authorization for its actions under rule 279, "Omissions From the Charge." *See* Tex. R. Civ. P. 279.

One of our sister courts facing similar circumstances has determined that a trial court can appoint DFPS as managing conservator when a jury question to

establish it as managing conservator is not asked. *See T.L.*, 2014 WL 6845166, *3–4. In *T.L.*, DFPS had already been named as temporary managing conservator of two of the mother's children when it filed an amended petition four days after the mother, who had been participating in some of the DFPS services, gave birth to another child. *Id.* at *1. Although the newborn remained with her mother until she was almost a year old, ultimately, DFPS was named the temporary managing conservator of all three children. *Id.* at *2. After the mother's parental rights were terminated to the older two children, a jury determined in a separate jury trial that her rights should not be terminated to the infant. *Id.* The jury was not asked any questions relating to conservatorship. *Id.* DFPS then sought to be named the infant's permanent managing conservator. *Id.* After briefing and a hearing, the trial court determined that it was not in the infant's best interest to be returned to the mother at that time, named DFPS as the child's managing conservator, and gave the mother possessory conservatorship and supervised visitation. *Id.*

On appeal, the mother argued that DFPS had waived the issue of permanent managing conservatorship by not seeking a jury question on the issue and by not including a reference to family code sections 153.131 or 263.404. *Id*. at *3. The court concluded that DFPS had included at least one family code provision—section 153.005—to support its pleading for managing conservatorship if the mother's parental rights were not terminated. *Id.* The court further noted that sections 161.205 and 153.002 gave the trial court the

statutory authority when the applicable family code provisions were "read as a consistent and logical whole" to determine that the mother was not at the time of trial an appropriate permanent managing conservator and to name DFPS as managing conservator instead. *Id.* "To hold otherwise, particularly when . . . T.L. herself opted not to seek the jury's answer about conservatorship, would put O.F.'s best interest subservient to technicalities of the rules governing pleadings and waiver" and would violate section 153.002's overarching consideration of the child's best interest. *Id.*[29] The court also noted that even though DFPS had

[29]In support of this holding, the Austin court cited *In re J.D.H.*, 661 S.W.2d 744, 748 (Tex. App.—Beaumont 1983, no writ), and *Evans v. Tarrant Cty. Child Welfare Unit*, 550 S.W.2d 144, 145 (Tex. Civ. App.—Fort Worth 1977, no writ). In *Evans*, we quoted the following to support our determination that the trial court did not abuse its discretion by appointing the child welfare unit as managing conservator when it denied termination of the mother's parental rights,

> "The technical rules of civil procedure cannot apply with equal force in a child custody case as in other civil cases, because the sole determining factor in a child custody case must be the best interests of the child." *Erwin v. Erwin*, 505 S.W.2d 370, 372 (Tex. Civ. App. [—]Houston [14th Dist.] 1974, no writ); *Burson v. Montgomery*, 386 S.W.2d 817 (Tex. Civ. App.[—]Houston 1965, no writ). "The trial judge in a custody case is afforded a wide discretion and its abuse must be clear in order to warrant a reversal, for he alone is able to judge the credibility and temperament of the parents as well as other intangibles which do not appear in the statement of facts before an appellate court.["] *Rauh v. Rauh*, 267 S.W.2d 584 (Tex. Civ. App. [—]Galveston 1954, no writ)[]; *Erwin v. Erwin*, [505 S.W.2d] at 372–73; *Mumma v. Aquirre*, 364 S.W.2d 220 (Tex. 1963).

550 S.W.2d at 145; *see also Leithold v. Plass*, 413 S.W.2d 698, 701 (Tex. 1967) (stating, in a suit to modify custody provisions in a divorce decree, that a suit properly invoking the trial court's jurisdiction with respect to custody and control of a minor child "vests that court with decretal powers in all relevant custody, control, possession, and visitation matters involving the child," that trial courts are

argued that failure to terminate would result in the child's going home with the mother and that no one discussed the possibility that DFPS would be named managing conservator if the mother's rights were not terminated, "Logically, if the Department had instead stated that it would seek [permanent managing conservatorship] as an alternative to termination, the jury would still have made the same decision, opting not to terminate T.L.'s rights." *Id.* at *4.

Based on the above reasoning, we conclude that the trial court *could* have appointed DFPS as B.O.'s managing conservator without abusing its discretion as both the evidence with regard to B.O.'s overarching best interest and the applicable family code provisions—including the ICPC—supported its actions. *See generally* Tex. Fam. Code Ann. §§ 153.005, 153.131, 161.205, 162.102, 263.404(a).

Further, the evidence—as set out in extensive detail above—was amply sufficient to support the jury's finding that appointing Mother and Father as the child's managing conservators would not be in B.O.'s best interest because to do so would significantly impair her physical health or emotional development. *See*

---

given wide discretion in such proceedings, and that "[t]echnical rules of practice and pleadings are of little importance in determining issues concerning the custody of children"); *J.D.H.*, 661 S.W.2d at 748 ("[T]he rule to be followed in child custody cases is that technical rules of civil procedure, as to practice and pleading, are not of controlling importance, since the controlling factor is the best interests of the child."); *Poulter v. Poulter*, 565 S.W.2d 107, 111 (Tex. Civ. App.—Tyler 1978, no writ) ("In matters concerning the support and custody of children the paramount concern of the court is the best interest of the children and the technical rules of pleading and practice are of little importance.").

T.L., 2014 WL 6845166, at *4. And the evidence showed that D.M. was unwilling to be B.O.'s managing conservator if she had to do so with Mother and Father as the child's possessory conservators. Based on the record before us, we hold that the trial court had sufficient evidence upon which to exercise its discretion and to reach its decision to appoint DFPS as B.O.'s managing conservator, and we overrule Mother and Father's first issue.

And because the only evidence before the trial court was that D.M. wanted to adopt B.O. but did not want to be her managing conservator if Mother and Father were the child's possessory conservators, the trial court did not abuse its discretion when it impliedly found that section 263.404's statutory preference for relative placement was sufficiently rebutted.[30] Because the trial court did not abuse its discretion by appointing DFPS as B.O.'s managing conservator, we overrule Mother and Father's second issue and do not reach their third issue.[31]

---

[30]Based on the record of Mother and Father's behavior pretrial, during trial, and post-trial, the trial court could have reasonably concluded that forcing B.O.'s primary caregiver to become an unwilling managing conservator with Mother and Father as possessory conservators might ruin the placement. *Cf. In re A.C.-D.R.*, No. 02-13-00150-CV, 2013 WL 6198854, at *5 (Tex. App.—Fort Worth Nov. 27, 2013, no pet.) (mem. op. on reh'g) (stating, based on statutory requirements and the trial court's actions, that to the extent that the mother argued that there was no finding that it would not be in the child's best interest to appoint a relative or another person as managing conservator instead of DFPS, "the finding is implied").

[31]We note that while we do not reach the issue of whether a non-parent non-party may be appointed as a child's sole managing conservator in a termination suit, which appears to be an issue of first impression in this court, several of our sister courts have addressed the issue and agreed that in a suit brought by DFPS, a trial court can appoint a non-parent non-party as a child's

See Tex. R. App. P. 47.1 (requiring court of appeals to hand down a written opinion that is as brief as practicable that addresses every issue raised and necessary to final disposition of the appeal).

V. Access to B.O.

In their final issue, Mother and Father argue that the trial court erred by ordering limitations on their possessory conservatorship of B.O. without sufficient consideration of the factors required to protect the child's best interest. Mother and Father complain that with the exception of B.O.'s long-term presence in New York, the trial court made no factual findings in support of the restriction of their right of access to the child and that the restrictions amounted to no access at all and a de facto termination of their parental rights. DFPS replies that the trial court did not abuse its discretion by deviating from the standard order of visitation because the evidence showed that Mother and Father had erratic behaviors "toward others involved in their lives and . . . their children," so that the deviation was in B.O.'s best interest.

---

sole managing conservator when there is some evidence of a substantive and probative character to support the trial court's decision, as supported by the relevant family code provisions and DFPS's pleadings and actions. *See A.J.I.L.*, 2016 WL 6110450, at *1, *6–7; *see also In re G.B.*, No. 09-15-00285-CV, 2016 WL 157842, at *5–7 (Tex. App.—Beaumont Jan. 14, 2016, no pet.) (mem. op.); *In re A.D.*, 480 S.W.3d 643, 645–46 (Tex. App.—San Antonio 2015, pet. denied); *In re R.A.*, No. 10-14-00352-CV, 2015 WL 3646528, at *2 (Tex. App.—Waco June 11, 2015, no pet.) (mem. op.); *In re Z.G.*, No. 11-11-00078-CV, 2012 WL 745090, at *7 (Tex. App.—Eastland Mar. 8, 2012, no pet.) (mem. op.). *But see Landry v. Nauls*, 831 S.W.2d 603, 604–05 (Tex. App.—Houston [14th Dist.] 1992, no writ). None of these cases address the ICPC.

Trial courts have broad discretion to determine the frequency and duration of visitation rights. *P.M.*, 2014 WL 8097064, at *30. A complete denial of parental access should be reserved for situations rising nearly to the level that would call for a termination of parental rights. *Philipp v. Tex. Dep't of Family & Protective Servs.*, No. 03-11-00418-CV, 2012 WL 1149291, at *8–9 (Tex. App.—Austin Apr. 4, 2012, no pet.) (mem. op.) (concluding that the trial court did not abuse its discretion by denying mother any access to child when evidence supported implied finding that contact with mother would not be in child's best interest); *In re Walters*, 39 S.W.3d 280, 286 n.2 (Tex. App.—Texarkana 2001, no pet.) ("[A] severe restriction or limitation, even one that amounts to a denial of access, is permissible if it is in the best interest of the child."); *cf. In re E.N.C.*, No. 03-07-00099-CV, 2009 WL 638188, at *18 (Tex. App.—Austin Mar. 13, 2009, no pet.) (mem. op.) (reversing trial court's order to the extent that it denied parent all access in light of little evidence that parent had been a perpetrator of harm and remanding case for trial court to determine what amount and type of access were appropriate under the circumstances). A trial court abuses its discretion if it imposes restrictions that exceed those required to protect the child's best interest. *In re H.D.C.*, 474 S.W.3d 758, 764 (Tex. App.—Houston [14th Dist.] 2014, no pet.)

In its findings of fact, the trial court limited both parents to supervised visitation and restricted their access to the child based on their behavior before and during trial, as well as their history of homelessness, lack of job stability, and

their having given up managing conservatorship of R. The trial court also mentioned Father's criminal history and his history of not providing adequate support to his other biological children. An attachment to the final judgment provided for Mother and Father to have supervised electronic visitation for fifteen minutes once a week and supervised in-person visitation once a month if they could pay for the visitation and (by inference) find a way to New York from Texas.

The record reflects that before B.O. went to New York to be placed with Mother's half-sister, Mother and Father had an hour of supervised visitation with B.O. twice a week. After B.O. was placed in New York, Mother and Father had ten minutes of supervised electronic visitation once a week.

Of course, no evidence of B.O.'s desires was submitted, but the record clearly reflected behavior by Mother and Father that risked her emotional and physical needs and would have subjected her to emotional and physical dangers—including the poison ivy rash that they transmitted to her in one of their in-person visits; their bed bug infestation in May 2016 when they were on their way to visit her and were pulled over for failure to maintain insurance on the vehicle; and Mother's outrageous behavior during that May 2016 stop in response to being arrested for failing to maintain that insurance and driving without a license, which included banging her head on the concrete, banging her head on the window of the police vehicle, and expressing her desire to die. Neither parent had a valid driver's license or insurance on their vehicle—behavior that could have led to their arrest and separation from B.O.—and they did not

carry insurance on their business, which could have led the family into further financial distress and renewed homelessness.

In light of their behavior on the occasion of the May 2016 arrest and before, during, and after trial, and in light of the condition that Mother and Father's residence had been in during the investigation of C.'s death, the trial court could have found credible the negative evidence of how R. had been raised before he was removed from Mother and Father after C.'s death. And although both parents were aware that failing to participate in their DFPS service plans could lead to their loss of their parental rights to B.O., both steadfastly refused to participate despite DFPS's efforts to accommodate them. The only excuse Mother and Father gave for any of their acts or omissions was poverty, and while they were quick to blame a vindictive DFPS for ruining their relationships with S.M. and D.M. and their children because they were homeless and poor, they seemed incapable of recognizing the effects that their own antisocial, defiant, obnoxious, and obstinate behavior had on virtually everyone with whom they interacted in the case, including potential jurors, and refused to take any responsibility for their socioeconomic status and environmental circumstances. And in the face of their inability to visit R. on occasion due to lack of funds to pay the visitation fee, Mother and Father still managed to support their $5 per day cigarette habit. *See generally Holley*, 544 S.W.2d at 371–72 (best interest factors). Perhaps most revealing was the self-congratulatory manner in which

both parents pointed out during trial that they had progressed from stealing to begging for a living.

The trial court also had to consider the caregiving provided by Mother, Father, and D.M. to B.O. before and during the current suit. Other than during their in-person visits prior to B.O.'s journey to New York, Mother and Father provided no caregiving because the child was removed from them at the hospital after she was born, but the trial court could consider evidence of how they had taken care of their other two children, R. and C., and their lifestyle choices. *See* Tex. Fam. Code Ann. § 263.307(b)(12); *In re E.A.W.S.*, No. 02-06-00031-CV, 2006 WL 3525367, at *10 (Tex. App.—Fort Worth Dec. 7, 2006, pet. denied) (mem. op.) (stating that while "[a]cts in the distant past, without a showing of a present or future danger to a child, cannot be sufficient to terminate a parent's rights . . . evidence of abuse [or neglect] of another child, coupled with present or future danger to the child in question, is relevant to determine whether a parent has engaged in an endangering course of conduct, even if the abuse [or neglect] occurred prior" to the subject child's birth). The trial court could take into consideration that Mother and Father had only supervised visitation with R.

D.M.'s care of B.O. was monitored by DFPS's equivalent in New York, with whom Harrison, B.O.'s CASA advocate, stayed in contact. Harrison also frequently exchanged email, text messages, and phone calls with D.M. for photographs and information about doctor's appointments. They also used Facetime. D.M. and her mother had taken care of B.O. for four months by the

time of trial. D.M. had her own bedroom, which had been freshly painted and carpeted, and a crib. D.M.'s mother had retired to provide child care for B.O. while D.M. worked. S.M. testified that she was in touch with D.M. on a weekly basis and was committed to maintaining a relationship between R. and B.O.

And the trial court had to consider the effect on B.O. that could result from separation, particularly in light of the fact that the separation, due to B.O.'s New York placement, had already been in place for several months by the time of the trial. The trial court further had to consider that although Mother and Father had testified that they were willing and available to take care of B.O., they had also indicated that they would take her with them to some of their tree-trimming jobs or leave her in day care. Given their history of panhandling and manipulative behavior and their expressed desire to keep possession of B.O. because she was their ticket into the shelter of their choice, the trial court could also have determined that Mother and Father would use the child to solicit handouts.

According to the evidence presented at trial, B.O. had not manifested any special physical, medical, behavioral, or developmental needs, but over the course of the case, Mother and Father demonstrated severe emotional and socioeconomic problems that could negatively affect B.O. Their child R. had been placed with S.M., who was interested in maintaining a sibling bond between R. and B.O. but was estranged from Mother and Father and unable to take B.O. because of the expenses of caring for R. Because B.O. had stability in New York with a relative, the trial court could have determined that it was in her best

interest to remain there, despite the hardship such distance might cause Mother and Father. *See* Tex. Fam. Code Ann. §§ 153.254, .256. Given all of these factors and in light of the record as a whole, we cannot say that the trial court abused its discretion by restricting Mother's and Father's access to B.O. to Facetime communications and supervised in-person visits. We overrule Mother and Father's last issue.

VI. Conclusion

Having overruled Mother and Father's dispositive issues, we affirm the trial court's judgment.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: MEIER, GABRIEL, and SUDDERTH, JJ.

DELIVERED: June 15, 2017