In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00421-CV

IN THE INTEREST OF L.F. AND S.D., CHILDREN

On Appeal from the 323rd District Court
Tarrant County, Texas
Trial Court No. 323-106696-18

Before Bassel, Womack, and Wallach, JJ.
Memorandum Opinion by Justice Wallach

MEMORANDUM OPINION

After a bench trial that Appellant M.C. (Mother)[1] had notice of but did not attend, the trial court terminated the parent–child relationships between Mother and her daughters L.F. (Lisa) and S.D. (Sarah) (together, the girls).[2] Mother raises four issues, and maternal grandmother D.D. (Grandma), who attempted to intervene in the suit on the day of trial, raises one issue. In three issues, Mother complains that the trial court erred by not appointing her counsel in the modification-and-termination suit filed by the girls' foster parents (the Fosters) (Issue One), by not appointing the girls an ad litem attorney or an amicus attorney in the Fosters' suit (Issue Two), and by allowing the girls' previously appointed dual-role attorney ad litem/guardian ad litem (dual ad litem) to continue representing the girls in the Fosters' suit (Issue Three). In Mother's fourth issue, she complains that the absence of an express best-interest finding against her invalidates the Order of Termination (termination judgment) and that the evidence is legally insufficient to show that the termination of her parental rights is in the girls' best interests. Grandma complains in her sole issue that the trial court erred by denying her standing under Family Code Section

[1]The trial court also terminated Father's rights, but he does not appeal.

[2]We use aliases to refer to the subject children, their family, and their foster family. *See* Tex. R. App. P. 9.8(b)(2) (requiring courts to use aliases to refer to minors in parental-rights termination cases and, if necessary to protect the minors' identities, to also use aliases to refer to their family members); *see also* Tex. Fam. Code Ann. § 109.002(d).

102.004 and by "excluding her from participating in trial and developing evidence to meet her . . . burden" under that statute. Because we hold that the evidence is legally sufficient to support the termination of Mother's parental rights and that the trial court did not reversibly err, we affirm the trial court's termination judgment as modified.

I. Background and Procedural Facts

In mid-January 2018, Child Protective Services (CPS) received a referral alleging neglectful supervision by Mother of her newborn daughter, Sarah. The concerns expressed in the referral were Mother's mental illness, paranoia, and drug history. The CPS investigator searched for the family for a month. On February 21, 2018, the fugitive squad found them, and Mother and her boyfriend were arrested. Mother told the CPS investigator that she had been diagnosed with depression and anxiety but that she did not take the medications prescribed—even though she believed she needed them—because she could not afford them. Mother admitted to the CPS investigator that she had used illegal drugs when her elder daughter Lisa was about two months old but denied using drugs since then. (Lisa was almost eighteen months old when the CPS investigator spoke to Mother.) However, the CPS investigator swabbed Mother for drugs, and she tested positive for amphetamines and methamphetamine. Mother again denied drug use but finally admitted to the CPS investigator that she had used methamphetamine a week earlier.

After CPS could not find a suitable family placement, the girls were placed with the Fosters, and the Texas Department of Family and Protective Services filed its "Original Petition for Protection of a Child, for Conservatorship, and for Termination in Suit Affecting the Parent–Child Relationship." About a year later, a final trial was held on the Department's petition; the trial court named the Department the girls' permanent managing conservator and named Mother, Father, and the paternal grandmother M.M. (Paternal Grandmother) possessory conservators. The trial court awarded Paternal Grandmother the right to physical possession of the girls. No party appealed this final order.

The girls did not live with Paternal Grandmother long. Approximately two months after the girls were placed with Paternal Grandmother, CPS received a referral alleging that she had taken the girls to a relative's home and that drug use occurred during the visit. About six weeks later, Paternal Grandmother tested positive for marijuana and cocaine, so CPS removed the girls and again placed them with the Fosters.

The Fosters then initiated a new suit, albeit in the same cause number, by filing a "Petition to Modify Order in Suit Affecting the Parent[–]Child Relationship and Petition to Terminate Parent–Child Relationship," seeking termination of the parents' rights, permanent managing conservatorship, and the removal of Paternal Grandmother as a possessory conservator. Paternal Grandmother was removed as the girls' possessory conservator in an interlocutory agreed order.

Mother was served with the Fosters' petition on July 15, 2019. She did not file an answer. However, on August 16, 2019, she appeared at the default-judgment setting. The trial court swore her in and set the trial for October 29, 2019, at 9:30 a.m. Mother did not appear at the October 29, 2019 trial, but her mother, Grandma, filed a petition in intervention at 8:07 a.m. the morning of trial, seeking sole managing conservatorship, joint managing conservatorship, or possession of and access to the girls. When the parties appeared for trial, the trial court first heard argument on the Fosters' oral motion to strike and Grandma's petition to intervene. The trial court "den[ied] standing on the intervention" and "den[ied] the intervention," which we interpret as a grant of the Fosters' motion to strike and a dismissal of Grandma's petition to intervene. The trial on the Fosters' petition then began.

Witnesses at the trial included Father,[3] Mrs. Foster, Cara Mulloy (the CPS conservatorship worker from November 2018 to August 2019), and Briana Daniels (the CPS conservatorship worker from August 2019 until trial). Exhibits included service returns for Mother, her boyfriend, Father, and Paternal Grandmother; information from the Tarrant County District Clerk Online website regarding Father's and Mother's Tarrant County criminal cases; a DNA report confirming that Father is Sarah's biological father; the dual ad litem's August 15, 2019 written report to the

[3]Father relinquished his parental rights during the trial.

court; CASA of Tarrant County, Inc.'s October 18, 2019 written report to the court; Facebook posts pertaining to Father but not Mother; the trial court's October 17, 2019 order requiring that both parents submit to "5 panel nail . . . drug screening" by 3:30 p.m. the following day and warning that the failure to comply with that order would "be considered a positive result for the purposes of any future hearing in this matter"; and the drug-testing company's notices that neither parent submitted to the test. The dual ad litem also delivered a brief oral report to the court after testimony had concluded.

II. Discussion

Because Mother's fourth issue, if sustained, would afford her the greatest relief, we address it first.

A. Best-Interest Finding Against Mother

In part of her fourth issue, Mother argues that the termination judgment is "invalid, void, or . . . incomplete" because the trial court "declined to make a finding that" termination of her parental rights is in the girls' best interests. Because an incomplete or void judgment could affect our jurisdiction, we address this subissue first. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195, 205 (Tex. 2001); *State ex rel. Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995) (per curiam). We hold that the trial court found that termination of Mother's parental rights was in the girls' best interests.

As Mother points out, the trial judge did not mention best interests when he announced his decision orally on the record:

> So this Court having heard the competent evidence will find that it is shown by clear and convincing evidence to support the termination of the parental rights as to both the mother and father.
>
> As to the mother this is based on grounds D, E, N and O and as to the father on ground K only, which is the affidavit of voluntary relinquishment.
>
> Furthermore, the Court will find based on the *Holley* test in determining managing conservatorship of this child, to name the Department . . . as the permanent managing conservator. This is based on the stability of the home and placement and the Court will also name [the Fosters] as the temporary possessory conservators as requested.

The trial judge's failure to mention best interests in his oral statements on the record is of no legal significance. The Supreme Court of Texas has held that a judge's remarks at trial may not be used to limit what may be implied from the judgment. *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984) (per curiam); *see also In re Q.M.*, No. 02-19-00367-CV, 2020 WL 827595, at *3–4 (Tex. App.—Fort Worth Feb. 20, 2020, no pet. h.) (mem. op.). Further, "[w]hen there is an inconsistency between a written judgment and an oral pronouncement of judgment, the written judgment controls." *In re L.G.R.*, 498 S.W.3d 195, 206 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see also In re J.R.*, No. 02-18-00317-CV, 2019 WL 237740, at *7 (Tex. App.—Fort Worth Jan. 17, 2019, pet. denied) (mem. op.); *ODIN Demolition & Asset Recovery, LLC v. Marathon Petroleum Co.*, No. 01-17-00438-CV, 2018 WL 4131038, at *7 (Tex.

App.—Houston [1st Dist.] Aug. 30, 2018, no pet.) (mem. op.); *Seasha Pools, Inc. v. Hardister*, 391 S.W.3d 635, 640 (Tex. App.—Austin 2012, no pet.).

Unlike the trial judge's oral statements on the record, his initialed docket entry from the date of trial does mention best interests:

> Final Termination. Termination of Parental Rights Granted.
> As to Mo, on grounds: D, E, N & O Mo defaulted.
> As to Fa, on ground: K only. Fa pro se
> Finally, Ct. finds that termination of all parents['] rights to each child would be in the child's best interests.

Docket entries may not be used to contradict trial court orders and are not generally considered to be trial court orders or findings. *See Haut v. Green Café Mgmt., Inc.*, 376 S.W.3d 171, 178–79 (Tex. App.—Houston [14th Dist. 2012, no pet.). However, appellate courts may consider them in determining what happened in the trial court. *Id.* Specifically, docket entries are some evidence of the contents of a rendered judgment. *Escobar v. Escobar*, 711 S.W.2d 230, 232 (Tex. 1986); *Woodward v. Woodward*, No. 14-18-00039-CV, 2019 WL 3943020, at *4 (Tex. App.—Houston [14th Dist.] Aug. 20, 2019, no pet.) (mem. op.).

Additionally, contrary to Mother's assertion, the termination judgment shows that the trial court did make an express best-interest finding when terminating her parental rights. Although the best-interest finding references Father instead of Mother, as shown below, the finding is located under a subheading that refers only to Mother, and the entire section relating to Mother is located after the section of the

termination judgment in which the trial court terminates Father's parental rights and makes a best-interest finding relating to him:

> *8. Termination*
>
> C[.F.] - Adjudicated ***Father*** of [Lisa] and Alleged ***Father*** of [Sarah]
>
> The Court finds by clear and convincing evidence that ***[Father]*** has—
>
> a. executed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Chapter 161, Texas Family Code, pursuant to 161.001(b)(1)(k);
>
> The Court also finds by clear and convincing evidence that termination of the parent–child relationship, if any exists or could exist, between ***the alleged father*** and the children, [Lisa] and [Sarah], the subject of this suit is in the best interest of the children.
>
> IT IS THEREFORE ORDERED that the parent–child relationship, if any exists or could exist, between ***[Father]*** and the children the subject of this suit is terminated.
>
> . . . .
>
> M[.C.] - Biological ***Mother***
>
> The Court finds by clear and convincing evidence that ***[Mother]*** has—
>
> a. knowingly placed or knowingly allowed the children to remain in conditions or surroundings that endanger the physical or emotional well-being of the children; . . .
>
> b. engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangers the physical or emotional well-being of the children;
>
> c. constructively abandoned the child[ren] who ha[ve] been in the permanent or temporary managing conservatorship of the Department . . . for not less than six months and: (1) the Department has made reasonable efforts to return

> the child[ren] to the mother; (2) the mother has not regularly visited or maintained significant contact with the child[ren]; and (3) the mother has demonstrated an inability to provide the child[ren] with a safe environment, pursuant to 161.00l(b)(l)(N); and
>
> d. failed to comply with the provision of a court order that specifically established actions necessary for the mother to obtain the return of the child[ren] pursuant to 161.001(b)(1)(O).
>
> The Court also finds by clear and convincing evidence that termination of the parent–child relationship, if any exists or could exist, between ***the alleged father*** and the children the subject of this suit is in the best interest of the children.
>
> IT IS THEREFORE ORDERED that the parent–child relationship, if any exists or could exist, between ***[Mother]*** and the children the subject of this suit is terminated.

[Emphases added.]

Thus, the issue is whether the reference to Father—"the alleged father"—in the section of the termination judgment that terminates Mother's rights is a judicial error or a clerical error. A judicial error results "from a mistake of law or fact that requires judicial reasoning to correct." *Hernandez v. Lopez*, 288 S.W.3d 180, 184–85 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (op. on reh'g). A clerical error is a discrepancy between the written judgment and the rendered judgment that is not a result of judicial reasoning or determination. *Andrews v. Koch*, 702 S.W.2d 584, 585 (Tex. 1986) (per curiam). We hold that the error here is merely clerical.

In re D.M. from the Fourth Court of Appeals is instructive. *See* No. 04-14-00059-CV, 2014 WL 2917458 (Tex. App.—San Antonio June 25, 2014, no pet.)

(mem. op.). In *D.M.*, the father challenging the termination of his parental rights on constructive-abandonment grounds argued that the Department did not prove that he had constructively abandoned his child because the termination order stated that the mother had not regularly visited or maintained significant contact with his child; the termination order did not state that the father had not done so. *Id.* at *3; *see also* Tex. Fam. Code Ann. § 161.001(b)(1)(N). The Fourth Court of Appeals reviewed the termination order:

> Paragraph 8 of the trial court's order of termination is titled "Termination of Alleged Father David M[.]'s Parental Rights." Subparagraph 8.13 finds that David M. constructively abandoned D.M. Twice in subparagraph 8.13 "mother" is crossed out and "father" was written in the trial court's handwriting. There is one instance in subparagraph 8.13 where "mother" is not crossed out. With the handwritten delineations, subparagraph 8.13 reads as follows:
>
> > [David M.] constructively abandoned the children who have been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services or an authorized agency for not less than six months and: (1) the Department or authorized agency has made reasonable efforts to return the children to the father; (2) the *mother* has not regularly visited or maintained significant contact with the children; and (3) the father has demonstrated an inability to provide the children with a safe environment . . . .

2014 WL 2917458, at *3. The Fourth Court noted that the context of the challenged termination order made it "apparent . . . that the references to 'mother' in subparagraph 8.1 were typographical errors and that the trial court corrected the

errors twice but inadvertently overlooked one reference to 'mother.'" *Id.* at *4. The Fourth Court interpreted the reference to "mother" to mean "father." *Id.*

In the case before us, the trial judge's initialed docket entry from the date of trial is some evidence that his termination decision rested not only on conduct grounds but also on the girls' best interests. *See Escobar*, 711 S.W.2d at 232. The organization and context of the termination judgment also show that the trial court found that termination of the parental rights of both parents was in the girls' best interests. *See D.M.*, 2014 WL 2917458, at *4. We hold that the termination judgment's use of "the alleged father" in the section of the termination judgment devoted to the termination of Mother's parental rights—a section that followed the section terminating Father's parental rights—was nothing more than a clerical error. We therefore conclude that the trial court found that termination of Mother's parental rights was in the girls' best interests. *See id.*; *see also Abboud v. Karam*, No. 04-10-00633-CV, 2012 WL 76963, at *2 (Tex. App.—San Antonio Jan. 11, 2012, no pet.) (mem. op.); *Tutson v. Upchurch*, 203 S.W.3d 428, 430 n.2 (Tex. App.—Amarillo 2006, pet. denied).

The best-interest finding and the conduct findings relating to Mother support the trial court's termination of her parental rights, and, as we hold in the next section, the evidence is legally sufficient to uphold the best-interest finding. We therefore modify the trial court's judgment to make the record speak the truth by deleting "the alleged father" from the section of paragraph 8 of the termination judgment

terminating Mother's parental rights and by replacing that deleted phrase with Mother's name. *See, e.g.*, *Shields v. Commercial State Bank*, No. 01-16-00643-CV, 2018 WL 3352980, at *6 (Tex. App.—Houston [1st Dist.] July 10, 2018, no pet.) (mem. op.); *Jordan-Nolan v. Nolan*, No. 07-12-00431-CV, 2014 WL 3764509, at *3 (Tex. App.—Amarillo July 28, 2014, no pet.) (mem. op.). We overrule this portion of Mother's fourth issue.

B. Legal Sufficiency of the Evidence to Support the Best-Interest Finding

In the remainder of her fourth issue, Mother challenges the legal sufficiency of the evidence to support the best-interest finding.

1. Standard of Review

For a trial court to terminate a parent–child relationship, the party seeking termination must prove two elements by clear and convincing evidence: 1) that the parent's actions satisfy one ground listed in Family Code Section 161.001(b)(1); and 2) that termination is in the child's best interest. Tex. Fam. Code Ann. § 161.001(b); *In re E.N.C.*, 384 S.W.3d 796, 803 (Tex. 2012); *In re J.L.*, 163 S.W.3d 79, 84 (Tex. 2005). Evidence is clear and convincing if it "will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Tex. Fam. Code Ann. § 101.007; *E.N.C.*, 384 S.W.3d at 802. Mother does not challenge the sufficiency of the evidence supporting the Section 161.001(b)(1) grounds found by the trial court. We therefore confine our analysis to the evidence supporting the best-interest finding.

To determine whether the evidence is legally sufficient, we look at all the evidence in the light most favorable to the best-interest finding to determine whether a reasonable factfinder could form a firm belief or conviction that termination of Mother's parental relationship with the girls is in the girls' best interests. *See In re J.P.B.*, 180 S.W.3d 570, 573 (Tex. 2005) (per curiam). We assume that the factfinder settled any evidentiary conflicts in favor of its finding if a reasonable factfinder could have done so. *Id.* We disregard all evidence that a reasonable factfinder could have disbelieved, and we consider undisputed evidence even if it is contrary to the finding. *Id.* That is, we consider evidence favorable to the finding if a reasonable factfinder could, and we disregard contrary evidence unless a reasonable factfinder could not. *See id.* The factfinder is the sole judge of the witnesses' credibility and demeanor. *In re J.O.A.*, 283 S.W.3d 336, 346 (Tex. 2009).

2. Substantive Law

Although we generally presume that keeping a child with a parent is in the child's best interest, *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam), the best-interest analysis is child-centered, focusing on the child's well-being, safety, and development, *In re A.C.*, 560 S.W.3d 624, 631 (Tex. 2018). In determining whether evidence is sufficient to support a best-interest finding, we review the entire record. *In re E.C.R.*, 402 S.W.3d 239, 250 (Tex. 2013). Evidence probative of a child's best interest may be the same evidence that is probative of a Subsection (b)(1) ground. *Id.* at 249; *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *see* Tex. Fam. Code Ann.

§ 161.001(b). We also consider the evidence in light of nonexclusive factors that the factfinder may apply in determining the child's best interest:

> (A) the [child's] desires . . . ;
>
> (B) the [child's] emotional and physical needs[,] . . . 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 [child's] best interest . . . ;
>
> (F) the plans for the child by these individuals or[, if applicable,] by the agency seeking custody;
>
> (G) the stability of the home or proposed placement;
>
> (H) the [parent's] acts or omissions . . . indicat[ing] that the existing parent–child relationship is not a proper one; and
>
> (I) any excuse for the [parent's] acts or omissions.

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976) (citations omitted); *see E.C.R.*, 402 S.W.3d at 249 (stating that in reviewing a best-interest finding, "we consider, among other evidence, the *Holley* factors" (footnote omitted)); *E.N.C.*, 384 S.W.3d at 807. These factors are not exhaustive, and some listed factors may not apply to some cases. *C.H.*, 89 S.W.3d at 27. Furthermore, undisputed evidence of just one factor may be sufficient to support a finding that termination is in the child's best interest. *Id.* On the other hand, the presence of scant evidence relevant to each factor will not support such a finding. *Id.*

3. Evidence of Best Interests

Mulloy, Daniels, and Mrs. Foster all testified that termination of Mother's parental rights is in the girls' best interests, and we conclude that the evidence sufficiently supports that conclusion. In discussing the applicable *Holley* factors, we begin with a focus on Mother's weaknesses, then we focus on the Fosters' strengths, and then we conclude with a discussion of how the girls fared while living with the Fosters.

a. Present and Future Dangers to the Girls

Mother's drug use was the most significant danger to the girls' well-being. Mulloy testified that the girls were removed because Mother was using drugs and could not take care of them. Mother admitted as much to CPS. She tested positive for methamphetamine, her drug of choice, when the girls were removed and was jailed for methamphetamine possession. Mother continued to use methamphetamine throughout the case. Mother sometimes appeared to be "high" when she arrived for visits with the girls. She never showed any ability to stay off drugs during the several months that Mulloy served as the conservatorship worker.

Mother's drug abuse continued after Daniels replaced Mulloy. Daniels stated that Mother admitted using methamphetamine and marijuana, that Mother had met with Daniels while Mother was "high," that Mother did not take the nailbed drug test that the trial court had ordered approximately two weeks before the trial on the

Fosters' petition, and that the Department and the trial court treated Mother's failure to submit to the drug test as a positive drug test.

Mulloy testified that a parent who uses methamphetamine cannot keep her children safe and endangers them.

b. Mother's Acts or Omissions and Excuses

In addition to her drug abuse, Mother engaged in criminal activity. Around the time of the girls' initial removal, Mother was charged with the state-jail felonies of theft and possession of a controlled substance. She was placed on deferred adjudication community supervision for the drug-possession charge. About a year after receiving those charges, she was charged with failure to identify. As a result, the trial court revoked Mother's community supervision on the drug-possession charge and ultimately convicted her and sentenced her to ninety days in jail for that offense and for the failure-to-identify offense.

Mother was given opportunities to turn her life around; she did not take advantage of them. Mulloy testified that

- Mother's service plan, which was created soon after the children were first removed, included drug treatment, counseling, NA/AA attendance, drug testing, and parenting classes.
- Mother could have worked on services in her service plan from February 2018 until October 2019.
- After the February 2019 final order awarding the Department permanent managing conservatorship and placing the girls with Grandmother, Mulloy explained to Mother that she could still work services to show her ability to provide the girls with a safe, stable home.

- Mother told Mulloy that she could not stay sober long enough to complete her services.
- Mother did not participate in any services on her service plan except inpatient drug treatment.

c. The Stability of the Home or Proposed Placement

Mulloy and Daniels both testified that Mother did not have stable housing and had no ability to provide the girls with a safe, stable home. Mulloy further testified that no one in the family was a viable placement option.

Mulloy visited the Fosters' home and found it safe and appropriate. Father testified that he believed the girls needed to stay with the Fosters: "That's their home."

d. The Fosters' Abilities and Plans

Mulloy and Foster testified about the Fosters' working to maintain a connection between the girls and their biological family. Foster testified that she believed the girls should know their biological family and "where they came from." She shared pictures and information about the girls regularly with the biological family. Father testified that the Fosters were "lovely" and were doing a good job of raising the girls.

The Fosters planned to adopt the girls if the parents' rights were terminated. Daniels testified that adoption would give the girls stability. The Fosters planned to continue sharing pictures and information with the biological family and to maintain the girls' connection with their biological roots for the girls' sake. Father testified that

based on his experience with the Fosters, he believed that they would continue to keep him informed of the girls' lives. He was not opposed to the Fosters' adopting the girls and believed that the Fosters would continue to give the girls a safe, stable environment.

Mulloy testified that the Fosters could meet the girls' physical, emotional, and health needs and provide them with a safe home. Daniels went further, testifying that the Fosters were dedicated to providing for the girls' present and future needs and that the Fosters were in fact meeting all the girls' needs.

e. The Girls' Wants and Needs

At the ages of three and one, Lisa and Sarah were too young to express their desires. When children are so young that they cannot express their desires, the factfinder can consider their bonds with their parents and their current caregivers and the quality of care the children receive. *In re V.B.*, No. 02-17-00318-CV, 2018 WL 771976, at *7 (Tex. App.—Fort Worth, Feb. 8, 2018, no pet.) (mem. op.); *In re S.R.*, 452 S.W.3d 351, 369 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

Mulloy, Daniels, and Foster testified that the girls were bonded to the Fosters and to their baby boy. Those three witnesses also testified about how well the girls were doing at the Fosters.

Mulloy testified that the girls thrived in the Fosters' home during the almost twelve months they lived there after their removal from their parents and again during the four and a half months they lived there after their June 2019 removal from

Paternal Grandmother's home. Mulloy explained that after Lisa was taken from the Fosters and placed with Paternal Grandmother, she began shying away from CPS personnel and no longer wanted to talk with them. After Lisa was placed back with the Fosters, her personality improved; she was happier, more open, and more carefree than she had been when living with Paternal Grandmother. Daniels testified that the girls were doing great at the Fosters: they were happy, played well together, and loved the baby.

Foster testified that three-year-old Lisa was smart, articulate, funny, loving, and sweet and that she loved dancing. According to Foster, twenty-month-old Sarah, a redhead, was quiet and sassy. Neither child had medical issues; Sarah received Early Childhood Intervention (ECI) for a speech delay.

4. Analysis

Mother characterizes the best-interest evidence as scant. We disagree; the evidence in this case is legally sufficient. "A parent's drug use, inability to provide a stable home, and failure to comply with [a] family service plan support a finding that termination is in the best interest of the child." *In re S.B.*, 207 S.W.3d 877, 887–88 (Tex. App.—Fort Worth 2006, no pet.). The evidence shows that by the time of trial, the girls had lived apart from Mother for more than twenty months—almost all of Sarah's life—and that Mother could not take care of the girls or provide them with a safe and stable home. Mother's drug abuse and related jail confinement caused the girls' removal from her, and her persistent drug abuse, instability, and refusal to

complete services other than inpatient drug treatment made that removal permanent. On the other hand, the evidence shows that with the Fosters, the girls were safe, loved, and cared for in a stable environment that the Fosters wanted to make permanent. Having reviewed all the evidence according to the appropriate standard of review, *see J.P.B.*, 180 S.W.3d at 573, we hold that the evidence is legally sufficient to support the trial court's best-interest finding, and we overrule the remainder of Mother's fourth issue.

C. No Appointed Counsel for Mother

Mother had appointed counsel in the Department's suit but not in the Fosters' suit. In her first issue, Mother complains that the trial court's failure to appoint trial counsel to represent her in the Fosters' suit violated her right to due process.

1. No Preservation

Mother did not preserve her due-process complaint. To preserve a complaint for appellate review, a party must present to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if not apparent from the request's, objection's, or motion's context. Tex. R. App. P. 33.1(a)(1)(A). If a party fails to do this, error is not preserved. *Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) (per curiam) (op. on reh'g). The record does not show that Mother requested appointed counsel in the Fosters' suit, nor does it show that she complained about the absence of appointed counsel.

When Mother appeared on August 16, 2019, the default-judgment setting for the Fosters' suit, the trial court told her that her appearance was equivalent to an answer and that the case would be reset at least 45 days later for notice purposes. The trial court also obtained her current mailing address, telephone number, and email address on the record. Then the following transpired:

> THE COURT: Now, you do have the right to an . . . an attorney. Okay? Because this is a suit that is not brought by CPS—so when CPS brings a suit, if you can't afford an attorney, I will appoint one for you, but this is not brought by CPS. So you have the right to an attorney. If you'd like to hire an attorney, you're more than welcome to, okay, but you don't have the right to have one appointed for you in this matter because CPS did not bring this suit.
>
> [MOTHER]: Okay.
>
> THE COURT: I want to make sure you understand that.
>
> . . . .
>
> THE COURT: . . . [S]o we're going to reset this at least 45 days out and you can hire an attorney if you would like to and they can certainly get involved in this or if you decide that you're agreeable to this, that's fine too. . . . I'm not giving you strategy or any legal advice. I'm just telling you kind of what your options are.
>
> [MOTHER]: Okay. Thank you.
>
> THE COURT: Do you have any questions for me?
>
> [MOTHER]: No, sir.
>
> THE COURT: Are you sure? Okay.

The trial court next determined the new trial date and time on the record, ensured that Mother knew the trial setting and that she wrote it down, and swore her in as a witness. Afterward, the following exchange occurred:

> THE COURT: Okay. And so at this point you're sworn in as a witness. So if you don't appear, you can't complain—if you don't appear on October 29th—
>
> [MOTHER]: Right.
>
> THE COURT: for this hearing, you can't complain that you didn't know about it or you didn't get to present your side of the story. Okay?
>
> [MOTHER]: I'll be here.
>
> THE COURT: No. I have no doubt about that. All right.
>
> Do you have any other questions for me at this point?
>
> [MOTHER]: No, Your Honor.
>
> . . . .
>
> THE COURT: All right. Thank you. All right. Well, I think that takes care of everything today. I know you're probably nervous. Most people are nervous when they come to court.
>
> Are you sure there are no other questions you want to ask? I don't mind answering questions. I just don't want you to not ask because you're nervous.
>
> [MOTHER]: No. I just don't really know how to go about this. I . . . didn't think it would come to this.
>
> THE COURT: Sure. All right. So what you can do is—and I can't give you legal advice as a judge, but I can tell you is there are attorneys that practice in here. What we

> can do is you may—we can give you a list of all the court-appointed attorneys that come out here. Now, they won't be free. They won't be court appointed, but you may be able to hire one or more of them or sit and talk and get consulted by them and that's just the list that we have to publish. Those are all the ones that take appointments on CPS termination cases. . . .
>
> . . . .
>
> . . . So there's quite a few names on there and so they should be able to help you—or they should be able to talk to you. I don't know if they can help you or not.
>
> [MOTHER]: All right. Awesome.

Like the reporter's record, the clerk's record does not show that Mother asked for or complained of the lack of appointed counsel in the Fosters' suit in the trial court.

Within her discussion of this issue in her brief on appeal, Mother contends that "[a]t no time was [she] afforded an opportunity to express to the court the importance of having an attorney appointed." Mother was served with the Fosters' suit on July 15, 2019. She attended the default-judgment setting on August 16, 2019, during which she received notice of the October 29, 2019 trial setting and was sworn in as a witness. She did not appear in court on October 29. We hold that Mother had approximately three and a half months—from the day she was served to the date of trial—to request appointed counsel or to complain on the record about the trial court's failure to sua sponte appoint her counsel. Mother did neither. She therefore failed to preserve her due-process complaint that the trial court erred by not

appointing her counsel in the Fosters' suit. *See* Tex. R. App. P. 33.1(a); *In re V.R.P.*, No. 04-04-00431-CV, 2005 WL 1552641, at *2 (Tex. App.—San Antonio July 6, 2005, pet. denied) (mem. op.). *See generally In re L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003); *In re B.L.D.*, 113 S.W.3d 340, 354 (Tex. 2003).

In *B.L.D.*, the Supreme Court of Texas held that generally, due process does not require appellate review of unpreserved complaints. 113 S.W.3d at 354. However, the Court also recognized that "in a given parental rights termination case, a different calibration of the *Eldridge*[4] factors could require a court of appeals to review an unpreserved complaint of error to ensure that our procedures comport with due process." *Id.* (discussing *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 32–33, 101 S. Ct. 2153, 2162–63 (1981)). We therefore address Mother's complaint.

2. Standard of Review

We review the trial court's decision whether to appoint counsel in a private suit for an abuse of discretion. *In re B.W.*, No. 02-19-00009-CV, 2019 WL 2041808, at *6 (Tex. App.—Fort Worth May 9, 2019, no pet.) (mem. op.). A trial court abuses its discretion if it acts without reference to any guiding rules or principles—that is, if its 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).

[4]*Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976).

3. Statutory Appointment of Counsel in Private Suit

The Texas Legislature has given courts discretion to appoint counsel for indigent parents in private suits. While Family Code Section 107.013(a) requires the trial court to appoint counsel for indigent parents in government-filed suits for termination of parental rights or custody, Tex. Fam. Code. Ann. § 107.013(a), Section 107.021 provides for the discretionary appointment of counsel for indigent parents in private termination or custody suits, Tex. Fam. Code Ann. § 107.021. *See In re J.C.*, 250 S.W.3d 486, 489 (Tex. App.—Fort Worth 2008, pet. denied).

4. Due-Process Right to Appointed Counsel

Even though the appointment of counsel for a parent in a private suit is not required by statute, due process may require it. *See* U.S. Const. amend. XIV. In *Lassiter*, the United States Supreme Court considered and balanced the three *Eldrige* factors—the parent's interest, the State's interest, and the risk that the trial court's procedures would lead to an erroneous decision—and then weighed them against the presumption that there is no right to appointed counsel absent a risk to the parent's liberty. *Lassiter*, 452 U.S. at 31, 101 S. Ct. at 2161–62. The Court determined,

> [T]he parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.

> If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the *Eldridge* factors will not always be so distributed, and since due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed, neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding.

Id. at 31, 101 S. Ct. at 2161–62 (citation and internal quotation marks omitted). Thus, the Supreme Court held that due process does not require the appointment of counsel in all termination cases. *Id.*, 101 S. Ct. at 2162. It further held that whether due process demands such an appointment in a particular case is the trial court's decision, subject to appellate review. *Id.* at 31–32, 101 S. Ct. at 2162.

On appeal, we review the facts and circumstances in the record to determine whether the trial court's decision not to appoint counsel deprived the parent of due process. *Id.* at 32, 101 S. Ct. at 2162. In making that determination, we may consider whether (1) the petition contains allegations upon which criminal charges could be based; (2) expert witnesses were involved; (3) the case presents complicated procedural or substantive legal issues; (4) the record shows that the lack of counsel resulted in a fundamentally unfair trial; (5) appointed counsel would have made a "determinative difference"; and (6) the parent showed a clear desire to challenge the termination. *See id.* at 32–33, 101 S. Ct. at 2162–63; *see also In re J.E.D.*, No. 11-19-00166-CV, 2019 WL 5617645, at *3 (Tex. App.—Eastland Oct. 24, 2019, no pet.)

(mem. op.); *In re T.L.W.*, No. 12-10-00401-CV, 2012 WL 1142475, at *1–3 (Tex. App.—Tyler Mar. 30, 2012, no pet.) (mem. op.); *In re R.J.C.*, No. 04–09–00106–CV, 2010 WL 816188, at *4 (Tex. App—San Antonio Mar. 10, 2010, no pet.). "[A] court deciding whether due process requires the appointment of counsel need not ignore a parent's plain demonstration that she is not interested in attending a hearing." *Lassiter,* 452 U.S. at 33, 101 S. Ct. at 2163.

5. Analysis

Mother had appointed counsel for the Department's suit. However, the Department's suit ended in a final judgment, and Mother did not appeal. The Fosters filed their suit to modify that final judgment and to terminate Mother's parental rights. It was filed in the same cause number, as required by Family Code Section 102.013(a), but it was an original suit filed by private parties. *See* Tex. Fam. Code Ann. §§ 102.013(a), 156.004. The Department, as the girls' managing conservator, was a respondent. Because the underlying suit was brought by the Fosters, not the Department, Mother had no statutory right to appointed counsel at trial. *See J.C.*, 250 S.W.3d at 489. *Compare* Tex. Fam. Code Ann. § 107.013(a)(1), *with id.* § 107.021(a)(2). Instead, the trial court had discretion to appoint her trial counsel. *See* Tex. Fam. Code Ann. § 107.021(a)(2); *J.C.*, 250 S.W.3d at 489.

Mother contends that even though the Fosters filed this suit, "nothing about the nature of the case or the State's involvement and participation in a suit to terminate [her] parental rights . . . had changed" and "that she [therefore] should have

been afforded a court appointed attorney as a matter of due process." However, the statutory distinction between Department-filed suits and private suits, coupled with the *Lassiter* holding that due process does not mandate that *all* indigent parents receive appointed counsel, 452 U.S. at 31, 101 S. Ct. at 2162, compels us to reject Mother's contention that she was entitled to the *same* due-process protections in the Fosters' suit that she had received in the Department-filed suit. *Cf. J.C.*, 250 S.W.3d at 489.

Regardless, based on our review of the Fosters' suit on its own merits, without comparing it to a government-filed suit, we conclude that due process did not demand that the trial court appoint Mother counsel in the Fosters' suit. The Fosters' petition contained no allegations against Mother upon which criminal charges could be based; the case presented no complicated legal issues; and no expert witnesses testified. *See Lassiter*, 452 U.S. at 32, 101 S. Ct. at 2162.

Mother contends that the issues in the Fosters' suit

> were so complex . . . that she was unable to defend her parental rights without the assistance of an attorney. The Reporter's Record reflects documents that were introduced into evidence that might have been objected to by an attorney, such as exhibits that were not accompanied by Business Records Affidavits or by a supporting witness; and screenshots of social media posts that were not accompanied by Business Record Affidavits or supporting witness and were subject to objection under the optional completeness rules.

However the law presumes that in a bench trial, a trial court disregards any incompetent evidence and considers only the competent evidence in reaching its decision. *Gillespie v. Gillespie*, 644 S.W.2d 449, 450 (Tex. 1982); *In re M.P.*, No. 02-14-

00032-CV, 2014 WL 3882179, at *22 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.) (per curiam) (mem. op.). The admission of such evidence generally will not require reversal when competent evidence supports the judgment. *Gillespie*, 644 S.W.2d at 450; *M.P.*, 2014 WL 3882179, at *22.

The keys to Mother's termination, as discussed above in our legal-sufficiency review of the best-interest finding, were her persistent drug use, her instability, and her failure to participate in any services on her service plan except inpatient drug treatment. Testimony from the CPS conservatorship workers sufficiently supported Mother's termination based on those facts, even without reference to the exhibits that Mother references on appeal (or to the oral report of the dual ad litem that she complains of in her third issue). Appointed counsel would not have made a "determinative difference" regarding those key facts. *See Lassiter*, 452 U.S. at 33, 101 S. Ct. at 2162. Furthermore, Mother did not bother to attend the trial. *See id.*, 101 S. Ct. at 2163. Nothing indicates that the absence of counsel representing Mother rendered the proceedings fundamentally unfair. *See id.*, 101 S. Ct. at 2162. Consequently, we hold that the trial court did not abuse its discretion by not appointing Mother trial counsel for the Fosters' suit. *See id.*, 101 S. Ct. at 2163; *J.E.D.*, 2019 WL 5617645, at *3; *T.L.W.*, 2012 WL 1142475, at *1–3; *R.J.C.*, 2010 WL816188, at *3–4. We overrule Mother's first issue.

D. Issues Involving the Girls' Representation and the Dual Ad Litem's and CASA Volunteer's Reports

In her second issue, Mother argues that the trial court erred by not appointing an ad litem attorney or amicus attorney for the girls. Mother did not raise this issue in the trial court and therefore failed to preserve error. *See* Tex. R. App. P. 33.1(a)(1)(A); *Bushell*, 803 S.W.2d at 712. She also lacks standing to raise this complaint. *See In re T.N.*, 142 S.W.3d 522, 524 (Tex. App.—Fort Worth 2004, no pet.).

Even if Mother had standing to complain and preserved error, she cannot show harm. To obtain reversal of a judgment based on an error in the trial court, the appellant must show that the error occurred and that it probably caused rendition of an improper judgment or probably prevented the appellant from properly presenting the case to this court. Tex. R. App. P. 44.1(a); *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 225 (Tex. 2005). The only harm Mother alleges in this issue is the absence of appointed trial counsel for herself, a complaint that we have already rejected. We overrule Mother's second issue.

In her third issue, Mother argues that the trial court erred by allowing the dual ad litem appointed in the Department-filed suit to continue her role in the Fosters' suit and that the trial court abused its discretion by admitting the dual ad litem's reports. Mother also complains about the continued appointment of the CASA volunteer and the admission of her report. Mother did not raise these issues in the

trial court and therefore failed to preserve error. *See* Tex. R. App. P. 33.1(a)(1)(A); Tex. R. Evid. 103(a)(1); *Bushell*, 803 S.W.2d at 712.

Even if Mother had standing to challenge the continued appointment of the dual ad litem and had preserved error regarding that complaint and the challenge to the admission of the dual ad litem's reports, she cannot show harm. Tex. R. App. P. 44.1(a); *Romero*, 166 S.W.3d at 225. The dual ad litem's written report provides,

- Both children were healthy and had no current medical issues.
- Sarah qualified for ECI.
- Mother continued to participate in drug use during the case.
- Mother did not show an ability to provide for the physical, medical, or emotional needs of the girls.
- Mother could not support or provide for the current health, safety, or welfare of the girls.
- Mother was unemployed and lacked stable housing.
- Because of Mother's drug use and instability, she could not parent the girls.
- The girls deserved a safe and stable home that could provide for their needs and give them permanence.
- The Fosters had the ability to provide a safe, stable, nurturing environment for the girls that would allow them to grow, develop, and be free from harm.
- The girls were bonded to the Fosters.
- The Fosters were meeting all of the girls' physical, psychological, medical, and emotional needs.

- The Fosters were willing to adopt these children and be their forever family.

- Termination of the parent–child relationships between the parents and the girls was in the girls' best interests.

At the trial on the Fosters' suit, the dual ad litem gave an oral report, stating,

> So as the attorney/guardian ad litem for both of these children, I have been to the home. I have seen them in their current placement. They're thriving, they're healthy children. All of their needs are being met. I have no concerns about the safety or condition of the home at all. I have had contact throughout this case with all of the family members. I've reviewed all of the home studies and everything in this case, and I believe it's in their best interest for them to remain in the home where they are because it's the most safe and stable placement that they can be in.

We have already held that the evidence is sufficient to support the best-interest finding, and we did so without relying on the dual ad litem's reports, which were cumulative of the trial testimony. Mother does not challenge the other grounds for termination. Any error was therefore harmless. *See* Tex. R. App. P. 44.1(a); *see, e.g.*, *In re Baby Boy R.*, 191 S.W.3d 916, 922 n.2 (Tex. App.—Dallas 2006, pet. denied).

Similarly, even if Mother had standing to challenge the alleged continued appointment of the CASA volunteer and had preserved error regarding that complaint and the challenge to the admission of the CASA volunteer's report, she cannot show harm. *See* Tex. R. App. P. 44.1(a); *Romero*, 166 S.W.3d at 225. The CASA volunteer's written report provides,

- The Department received a referral alleging neglectful supervision of the girls by Mother on the day Sarah was born in January 2018. Hospital

personnel were worried that because of Mother's mental illness, paranoia, and prior drug history, she could not care for Sarah.

- The CPS investigator was assigned the day after the referral but could not locate the family for a month.

- In February 2018, the fugitive squad found Mother, her boyfriend, and the girls.

- Mother was then in jail on a felony theft charge. She was also in jail from mid-March 2018 to mid-May 2018 and again from February 2019 through May 2019.

- Mother told the CPS investigator that she had been diagnosed with depression and anxiety but was not taking medication because she could not afford it.

- Mother told the CPS investigator that she used methamphetamine, cocaine, and marijuana when Lisa was a baby but that she had not used drugs since then.

- Mother tested positive for amphetamines and methamphetamine on an oral drug swab in February 2018. She completed inpatient drug treatment in May 2018, but she tested positive for cocaine in September 2018 and did not submit to a drug test in October 2018.

- Mother would go missing for several weeks at a time.

- CPS did not approve any of the placement options that Mother offered.

- The girls were removed and placed with the Fosters on February 21, 2018.

- One year later, the girls were placed with Paternal Grandmother.

- Two months later, CPS investigated Paternal Grandmother and drug-tested her and the girls.

- When CPS received Paternal Grandmother's positive results for marijuana and cocaine in mid-June 2019, CPS moved the girls back to the Fosters.

- At Lisa's three-year-old checkup, after learning that she had begun stuttering occasionally, the doctor requested a speech evaluation because of Lisa's previous drug exposure.

- Sarah's speech was two months behind in February 2019, so ECI recommended services.

- CASA visited the girls at the Fosters. Lisa appeared to be happy, excited, playful, fearless, energetic, and enjoying life, and Sarah appeared happy and played well with her sister.

- CASA visited the girls at daycare and at dance class and noted that the girls appeared to enjoy both.

- CASA recommended that Mother's and Father's parental rights be terminated and that the Department have permanent managing conservatorship of the girls until the Fosters could adopt them.

We have already held that the evidence is legally sufficient to support the best-interest finding. Mother does not challenge the other grounds for termination, and much of the information in the CASA volunteer's report is cumulative of the other evidence admitted at trial. To the extent that the report provides more detail than the other trial evidence, such detail was not necessary for the trial court to terminate Mother's parental rights, and we did not rely on the CASA volunteer's report to uphold the trial court's best-interest finding. The admission of the report was therefore harmless. *See* Tex. R. App. P. 44.1(a); *see, e.g.*, *Baby Boy R.*, 191 S.W.3d at 922 n.2. We overrule Mother's third and remaining issue.

E. Grandma's Standing to Intervene

In her sole issue, Mother's mother, Grandma, contends that the trial court erred by "denying [her] standing . . . under . . . Family Code Section 102.004 and [by]

excluding her from participating in trial and developing evidence to meet her . . . burden" under that statute, which we interpret as a complaint that the trial court erred by dismissing her petition to intervene in the Fosters' suit. The Department and the Fosters both respond that Grandma failed to preserve error under Section 102.004 because she did not argue that she had standing under that section in the trial court. Alternatively, they argue that if she did preserve her Section 102.004 standing claim, she offered no evidence to support it.

In her petition, Grandma alleged that she had standing to intervene as the girls' maternal grandparent because Mother's rights had not yet been terminated. Grandma pled for sole managing conservatorship, alleging that the appointment of either parent as the sole managing conservator would not be in the girls' best interest because the appointment would significantly impair their physical health or emotional development. She alternatively pled for joint managing conservatorship with the Fosters, or, if "standing for conservatorship [was] not found to be adequate," for possession and access under Section 153.433 of the Family Code. *See* Tex. Fam. Code Ann. § 153.433.

Grandma's trial counsel argued at the hearing on the petition and on the Fosters' motion to strike that Grandma had standing based on her grandparent status, the fact that she had seen the girls "on a regular almost daily basis" when they were not with the Fosters, and the fact that Mother's rights had not yet been terminated. Grandma's trial counsel also contended that with more time, she could "get the

[consent] of . . . [M]other who also [was] still the parent to be in favor of the suit under 103 as well or 102." When asked by the trial court to name what section of the code she was relying on, Grandma's trial counsel responded, "Okay. For grandparent access, I would be going under 153.433[,] and if allowed time, under 102, under general standing, I would be looking to get an affidavit of support from the grandparent under general—or from the parent." After the trial court indicated that it was "not inclined to give time to look to get," Grandma's counsel stated that the "best legitimate cause for standing" was that Grandma was "within the third level of consanguinity" and was also "the grandparent whose child's rights had not yet been terminated." Grandma's trial counsel stated that Mother was "in the wind" so they could not obtain an affidavit from her without more time. Grandma's petition was not supported by an affidavit, and no party offered evidence at the hearing. The trial court denied the intervention.

1. Preservation

This court addresses standing complaints based on the Family Code as it does constitutional standing complaints, holding that standing is a component of subject-matter jurisdiction and cannot be waived. *In re L.M.*, No. 02-16-00127-CV, 2016 WL5957030, at *11 (Tex. App.—Fort Worth Oct. 13, 2016, pet. denied) (mem. op.); *In re H.L.*, No. 02-14-00388-CV, 2016 WL 354080, at *5 n.13 (Tex. App.—Fort Worth Jan. 28, 2016, pet. denied) (mem. op.); *see also Tex. Ass'n of Bus. v. Tex. Air*

Control Bd., 852 S.W.2d 440, 443 (Tex. 1993). We will therefore address Grandma's complaint.

2. Standard of Review

Standing, a component of subject-matter jurisdiction, is a constitutional prerequisite to maintaining a lawsuit. *See In re H.S.*, 550 S.W.3d 151, 155 (Tex. 2018); *In re Clay*, No. 02-18-00404-CV, 2019 WL 545722, at *3 (Tex. App.—Fort Worth Feb. 12, 2019, orig. proceeding [mand. denied]) (mem. op.). In a suit affecting the parent–child relationship (SAPCR), standing is governed by the Family Code. *Clay*, 2019 WL 545722, at *3. Because standing is a question of law; we review standing determinations de novo. *Id.*

We review the trial court's ruling on a motion to strike an intervention petition for an abuse of discretion. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990) (op. on reh'g); *Clay*, 2019 WL 545722, at *3; *In re N.L.G.*, 238 S.W.3d 828, 829 (Tex. App—Fort Worth 2007, no pet.).

3. Substantive Law

A party seeking relief in a SAPCR must allege and establish standing within the parameters of the language used in the relevant statute. *Clay*, 2019 WL 545722, at *3; *In re G.H.*, No. 02-14-00261-CV, 2015 WL 3827703, at *2 (Tex. App.—Fort Worth June 18, 2015, no pet.) (en banc) (mem. op. on reconsideration). If, at minimum, a fact issue is not raised, the trial court must dismiss the intervention petition. *Clay*, 2019 WL 545722, at *3.

Grandma's status as a grandparent is undisputed, and she does not allege that the parents or the Department consented to her intervention. Thus, to intervene under Section 102.004(a), Grandma had the burden to provide "satisfactory proof" that the girls' "present circumstances would significantly impair" their "physical health or emotional development." Tex. Fam. Code Ann. §102.004(a)(1); *In re Lewis*, 357 S.W.3d 396, 399 (Tex. App.—Fort Worth 2011, no pet.). To intervene under Section 102.004(b), Grandma had the burden to provide "satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the [girls'] physical health or emotional development." Tex. Fam. Code Ann. § 102.004(b). The burden under Section 102.004 has been described as "a very heavy threshold burden," *Clay*, 2019 WL 545722, at *4 (citation and internal quotation marks omitted), and a "high bar," *In re L.D.F.*, 445 S.W.3d 823, 830 (Tex. App.—El Paso 2014, no pet.).

Satisfactory proof is proof by a preponderance of the evidence existing at the time Grandma sought to intervene. *See Clay*, 2019 WL 545722, at *4. While we construe Grandma's pleadings in her favor, *H.S.*, 550 S.W.3d at 155, standing under Section 102.004 is based on the existence of proof rather than the pleadings, *Rolle v. Hardy*, 527 S.W.3d 405, 416 (Tex. App.—Houston [1st Dist.] 2017, no pet.). That proof must be offered to the trial court on the standing issue, and the trial court must determine standing before the potential intervenor may participate in the trial on the merits. *In re A.T.*, No. 14-14-00071-CV, 2014 WL 11153028, at *9 (Tex. App.—

Houston [14th Dist.] July 15, 2014, no pet.) (mem. op. on reh'g); *In re K.D.H.*, 426 S.W.3d 879, 884 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *see In re Howell*, No. 04-16-00258-CV, 2016 WL 3181338, at *1 (Tex. App.—San Antonio, June 18, 2016 orig. proceeding) (per curiam) (mem. op.). The trial court serves as a gatekeeper by ensuring that "satisfactory proof" exists before deciding that a party has standing to participate in the trial on the merits. *A.T.*, 2014 WL 11153028, at *9; *K.D.H.*, 426 S.W.3d at 884.

Grandma did not offer any proof at the hearing. She therefore did not satisfy her burden to prove standing. *See Howell*, 2016 WL 3181338, at *1; *A.T.*, 2014 WL 11153028, at *9; *In re C.A.H.*, No. 11-10-00040-CV, 2011 WL 947082, at *3 (Tex. App.—Eastland Mar. 3, 2011, no pet.) (mem. op.). Thus, we hold that the trial court did not abuse its discretion by granting the Fosters' motion to strike the petition to intervene and did not err by dismissing Grandma's petition or by "denying [her] standing . . . under . . . Family Code Section 102.004 and [by] excluding her [from] participating in trial and from developing evidence [at trial] to meet her . . . burden under" that statute. We overrule Grandma's sole issue.

III. Conclusion

Having overruled Mother's four issues and Grandma's sole issue, we modify the trial court's termination judgment by deleting "the alleged father" from page 4 of the termination judgment and by replacing that deleted phrase with Mother's name. We affirm the termination judgment as modified.

/s/ Mike Wallach
Mike Wallach
Justice

Delivered: May 7, 2020