# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-20-00033-CV**

**E. R., Appellant**

**v.**

**Texas Department of Family and Protective Services, Appellee**

**FROM THE 146TH DISTRICT COURT OF BELL COUNTY**
**NO. 297,503-B, THE HONORABLE JACK WELDON JONES, JUDGE PRESIDING**

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

Following a bench trial, the trial court found that E.R. had engaged in conduct and knowingly placed her children with persons who engaged in conduct which endangered the children's physical and emotional well-being and that termination of her parental rights was in the best interest of the children.[1] *See* Tex. Fam. Code. § 161.001(b)(1)(E), (2). The court signed a decree terminating E.R.'s parental rights to her daughter "Ann," who was ten years old at the time of the final hearing; daughter "Marie," who was almost six; and son "Max," who was three. On appeal, E.R. argues that the evidence is insufficient to support the trial court's findings on statutory grounds and best interest and that the court erred in sustaining an objection as to

[1] We refer to appellant by her initials and to the children and other involved individuals by aliases. *See* Tex. Fam. Code § 109.002(d); Tex. R. App. P. 9.8. The trial court also terminated the parental rights of the children's fathers, but neither has appealed.

testimony by the children's guardian ad litem. As explained below, we will affirm the termination decree.

## FACTUAL SUMMARY

In January 2018, the Texas Department of Family and Protective Services sought and obtained conservatorship over the children after a violent altercation involving E.R., her mother "Eliza," Ann's father "John," and John's girlfriend "Dawn." The children were placed with E.R.'s father "Chris" and his wife, E.R.'s stepmother. In early March 2019, the children were returned to her care on a monitored basis. When E.R. tested positive for methamphetamine and amphetamine in mid-July 2019, however, the monitored return was disrupted. The children were placed back with Chris and his wife at the end of July, and E.R. essentially ceased contact and cooperation with the Department. The final hearing was conducted in November 2019.

The Department's removal affidavit, which was admitted at trial, alleged:

- According to a Killeen police detective, in December 2017, while in eight-year-old Ann's presence, E.R. and Eliza got into a fight with John and Dawn during a custody exchange. With Ann in the car with them, E.R. and Eliza drove up to John's car, where Dawn was waiting with John's two younger children, Ann's half-siblings. E.R. began to assault Dawn through the car window, and Dawn got out to continue the fight. E.R. then got into John's car—with his younger children still inside—and tried unsuccessfully to run him over, instead running into a tree or concrete structure. E.R. left John's car and started to assault him while Eliza sprayed him with mace or pepper spray. Finally, Eliza backed her car into John's wrecked car before she, E.R., and Ann drove away.

- When a Department caseworker went to interview Eliza about the incident, Eliza was uncooperative, threatened to call the police, and denied knowing where E.R. was. The Department conducted several other interviews and then obtained a court order allowing it to remove Ann, Marie, and Max from E.R.'s care. A caseworker and several police officers went to Eliza's residence, where they were denied access and had to force their way in. Ann, Marie, and Max were there with a caregiver named Katrina, who said she had been told not to let anyone in. The caseworker and law enforcement officers smelled marijuana throughout the home and on the children's clothing.

- The caseworker interviewed Ann, who was in the car when Eliza backed into John's car and who said that she saw E.R. drive John's car "into a cement pillar" while her brothers were in the car. Ann was "very scared but calmed down afterwards because [Eliza] took the car to the car wash to clean it off." She also said E.R. and Eliza told her that John "was lying about everything and that she did not need to tell anyone about the wreck."

- The Department's first contact with E.R. was in 2010, when Ann was ten months old. The Department received a report of neglectful supervision after E.R. stabbed herself in the leg during a dispute with Eliza. E.R. was admitted for psychiatric treatment, and Ann was removed from her care while she worked services. The case was closed and Ann was returned after E.R. "made significant progress . . . and was able to demonstrate stability and an ability to provide for and protect her daughter." When the case was closed, there were "no safety concerns regarding [Ann] in [E.R.'s] care." The Department stated that Eliza's parental rights to E.R.'s siblings had been terminated and that E.R. had "done well with not allowing her mother contact."

- In 2013, the Department received a report of domestic violence involving E.R., Eliza, and John. The case was designated "Unable to Complete" because E.R. "did not cooperate with the Department and did not give the Department access to the child."

- In 2014, E.R. and her sisters were arrested for burglary of a habitation. In that altercation, "Grandmother"[2] drove E.R. and her sisters to one of the sisters' ex-boyfriend's houses. Ann[3] was in the back seat in her car seat at the time. The sisters forced their way inside the house, the boyfriend shot his pistol into the air, and a large rock was thrown through the back window of Grandmother's car. E.R. and her sisters were arrested, leaving Ann in Grandmother's care. The Department ruled out an allegation of neglectful supervision because Ann was not injured; none of the adults had expected the situation to escalate the way it had; and E.R. did not have a "criminal history for violence," had been "appropriately involved with her daughters and ha[d] met all of their needs," had extended support in her home, and was protective of her children.

- In 2016, the Department ruled out an allegation of neglectful supervision and physical abuse. E.R. tested negative for illegal drugs and appeared "to be meeting the children's daily needs," and there were no reports of concerns from other "collateral" individuals.

- E.R. had a criminal history including charges of driving without a license (charge dismissed), traffic offenses (no dispositions noted), burglary of a habitation (deferred),

[2] The affidavit does not specify whether "Grandmother" was Eliza.

[3] There is some confusion in this portion of the affidavit because the allegation is titled "Neglectful Supervision of [Marie]" but then refers to "Oldest Victim," who is elsewhere identified as Ann, being in the car and being in Grandmother's care. Aside from naming Marie in the title, the affidavit does not mention Marie by name or by her title, "Sibling."

bail jumping and failure to appear (convicted), forgery of a financial instrument (dismissed), and fraud related to identifying information (deferred).

The Department also introduced into evidence its final report from October 2019, in which it set out the parents' progress on their respective safety plan requirements and described the children's progress and situation.[4] The Department stated that E.R. had stopped taking weekly drug tests and had ceased contact with the Department in August 2019 after the monitored return was disrupted. Before that point, E.R.'s drug test history was as follows: a positive urinalysis and a positive hair follicle test—both for marijuana—in early January 2018; a number of missed tests from January through June 2018; a gap from March through June 2018 while E.R. was incarcerated; seventeen negative tests from July through mid-November 2018; missed or refused tests from mid-November 2018 through March 2019; two negative oral swabs and one hair follicle test that was positive for marijuana in April 2019; several positive urinalyses for marijuana from April through June 2019; two urinalyses in July 2019 that were positive for amphetamine and methamphetamine; one positive urinalysis for marijuana in July 2019; and negative tests in late July and early August 2019.

Department caseworker Sherry Jones testified that she had been assigned to the case about three weeks before the final hearing. She had knowledge of E.R.'s behavior throughout the case only through her review of Department records and had not had any direct dealings with E.R. Jones said that the Department had attempted to reunite E.R. with the children, including returning the children to her under a monitored return, but that E.R. had

[4] In addition to the 2017 removal affidavit and the Department's final October 2019 report, E.R.'s drug test results were also admitted into evidence without any objection. However, E.R. objected to the Department's July 2019 affidavit supporting the disruption of the monitored return on grounds of hearsay. The trial court admitted the document "but not for the truth of the [matter] asserted." We will not consider that affidavit in our analysis.

relapsed into using illegal drugs and that the monitored return had been "disrupted due to [E.R.] testing positive for methamphetamines." Jones believed it would be dangerous for a child to be in the care of someone using methamphetamine because the drug alters a person's thinking, judgment, and priorities. Jones said that the Department's plan was for E.R.'s rights to be terminated and for the children to be adopted by Chris and his wife. Jones was asked if she had "any doubt" about what was in the children's best interest, and she replied, "No, sir," testifying that she believed it was in their best interest for E.R.'s rights to be terminated and for the children to remain with their grandparents.

Cathy Rothas, the children's guardian ad litem, testified, "I believe it's in the [children's] best interest that parental rights be terminated in order to afford them a safe and appropriate forever home with their grandparents." She agreed that E.R. had "repeatedly and consistently tested positive for illegal drugs," including during the monitored return.

E.R. testified and admitted that she pled guilty to terroristic threat after the precipitating altercation with John in 2017 but said that she did not drive his car and "didn't even threaten him really." E.R. testified that she pled guilty to terroristic threat because "they were trying to give me an aggravated assault charge. But I didn't aggravatedly assault anybody." E.R. said that John "basically lied" and that "when they got the video and actually seen what happened they only could—I had to take some kind of lesser charge because I didn't aggravatedly assault anybody." She initially denied having a criminal record but then clarified that she did not have "any violent criminal history." She admitted to "two charges on my criminal record. And one is dismissed because I got off of probation."

E.R. testified that during the monitored return:

> My kids were great. They loved it. They loved being home. We moved from Killeen to Austin. They loved it. They were ecstatic about being home. They were happy about being home. I loved them being home. I wouldn't do anything to jeopardize them being home like doing methamphetamine and knowing my kids can be removed.

E.R. denied using methamphetamine: "I've never used meth ever in my life." She said, "All I want to do is just—I'm not a drug user. I do smoke marijuana. I have smoked marijuana. That's it. As far as meth, never. I feel insulted by that." E.R. denied using drugs at all during the monitored return and asserted that she only tested positive for marijuana because it "took over six months to get out of my system." E.R. also noted that she never tested positive for methamphetamine while she was on probation and said it would have been a probation violation for her to use methamphetamine.[5] Asked about the positive tests for methamphetamine in July 2019, E.R. testified that she did not know how to explain those results and that she had asked her doctor "about the medicine that I was taking" and provided that information to the Department. She said she "would have liked for the department to, instead of removing my kids, figure out" why she tested positive, at which point the Department objected to her answer as nonresponsive.

E.R. said that she wanted custody of her children but that if that was not possible, she wanted to retain her parental rights and for the children to remain with her father. E.R. explained, "If I can't have my kids back home, I just want my rights because if anything happens to my dad, can't nobody love my kids like I do. I do—I feel—and I just really would want my rights—my parental rights." If the children remained with Chris, she would have "no problem" working out visitation, and she said she would pay child support and provide "food, clothing, whatever." However, when asked if she had paid child support during the pendency of the case,

[5] There was no further evidence offered about any probation-related drug tests.

E.R. explained that she had lost her job early in the case and had only been able to provide $200 for a birthday party and new school clothes shortly before trial—"three or four pairs of shoes for each child and ten to 12 outfits a piece for each child."

E.R. testified that before February 2019, she had a "side business" cleaning houses and that she started a retail job in February 2019 but lost it later in the year. She explained that she lost her retail job because she had to miss work repeatedly for court appearances in this case. She said that she took family-medical leave from August through September 2019 and that she was to attend an orientation for a new job later in the afternoon of the final hearing. She also testified that she had gone to counseling, had completed a psychological evaluation, and had a relationship with her father and stepmother.

Chris testified that the children were living with him and his wife and that his plan was "[t]o have them in a stable environment—I want them to be in a stable environment where they don't have to have no type of ruckus, anything around them and have good schooling and so forth." He said that the children love E.R.; that the older two children "had had more time with their mother"; and that the youngest child, who had been with Grandfather for most of his life, "does love his mother. But he loves being with me a lot more. He just like[s] being around me." Chris also said that the children want to remain in his home and have told him and their guardian ad litem and "anybody asking" that "they want to have some contact with their mom." He said that E.R. had not seen the children in several months because she did not like "visiting at the department." Chris thought E.R. had put her own needs and wants above the children.

Chris agreed that the children were thriving in his home and doing well in school. Chris was asked if the children were "doing much better than they were," and he answered, "Yes, sir. I believe so." Chris wanted to adopt the children and said he thought the children

needed to know where they would be living in the future and who would be making decisions on their behalf. Asked about adoption versus managing conservatorship, Chris said he had discussed it with his wife and E.R. E.R. had told him she could try to help with child support but had never paid child support while the case was pending. Chris thought adoption would be best for the family because of financial assistance that would be available to him and the family. Chris testified that he wanted to do what was best for the children and that he was "still in good shape, still working good and whatever. But it's hard to raise three kids."

Chris said the first he had heard about any methamphetamine use by E.R. was in the final hearing. He was asked, "[S]o you would not like to go home and tell [Ann], If your mother stops using methamphetamine, she might be able to go home to you in six months? You don't think that that would be help for [Ann's] development?" Chris answered:

> I don't think so. The reason why I say that is because right now [Ann] is confused. She's really real confused because at first when we had her she was used to it. She was used to this or that. She was all right as she was good with just seeing mom here and there, here and there. But when the Court overruled—I was at work at that time—and brought her back, you know, she cried. And then they had to come take her back out of school because she was crying. [Marie] was crying. [Marie] is more happy because she do love her mother. And [Ann], she was happy. She like her grandmother, [Eliza]. But she was sad. She was sad that she—she cried. It hurt me more because now they got to go back. And I told my daughter—I told my daughter, Make sure you do everything right because if this is your chance to make sure, do it. So—and then when like they came and whatever happened with [E.R.], my daughter, whatever happened, [Ann] had to come back. And then she was like, Well, now I'm mad and sad. I said, What's wrong? Well, I was liking it at my mom's, this and that, like she got to [be] retransitioned.

Although Ann initially cried when she was removed from his care for the monitored return, she "was happy after" being returned to E.R. and she was saddened again when the return was

disrupted: "She don't know if she going to be with her mom. She don't know if she going to be with her grandfather. She just don't know."

Chris testified that he knew that E.R. smoked marijuana "a lot" and that he and E.R. had in the past fought about that use but that he had not known about any methamphetamine use before trial. Chris said:

> But with the news [about E.R.'s alleged methamphetamine use], I don't—I'm just here to support it, whatever it is, for my grandkids. Like I told my daughter, I love her. That's my daughter. I can't never say I ain't never going to love her. But it's about the kids now. So I want them to have a better future than what's going right now because this jumping houses, this household, don't know what they going to be—what's going to happen after that, so forth. I believe with me, they will be stable.

## STANDARD OF REVIEW

To terminate a parent's rights to her child, the Department must prove by clear and convincing evidence that the parent engaged in conduct that amounts to at least one statutory ground for termination pursuant to section 161.001 and that termination is in the child's best interest. Tex. Fam. Code § 161.001; *In re S.M.R.*, 434 S.W.3d 576, 580 (Tex. 2014). Clear and convincing evidence is "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Tex. Fam. Code § 101.007; *In re K.M.L.*, 443 S.W.3d 101, 112 (Tex. 2014).

The family code allows for the termination of a parent's rights to her child if the factfinder determines that she "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." Tex. Fam. Code § 161.001(b)(1)(E). "'[E]ndanger' means more than a threat of metaphysical injury or potential ill effects of a less-than-ideal family environment, but that endangering

conduct need not be directed at the child." *In re E.N.C.*, 384 S.W.3d 796, 803 (Tex. 2012). To support termination under subsection (E), the Department must show by clear and convincing evidence that the parent, through her own acts and omissions, exposed the children to loss or injury or jeopardized their emotional or physical well-being. *A.C. v. Texas Dep't of Family & Protective Servs.*, 577 S.W.3d 689, 698 (Tex. App.—Austin 2019, pet. denied); *In re J.T.G.*, 121 S.W.3d 117, 125 (Tex. App.—Fort Worth 2003, no pet.). Endangerment may be inferred from parental misconduct, *A.C.*, 577 S.W.3d at 698, but termination under subsection (E) "must be based on more than a single act or omission; a voluntary, deliberate, and conscious 'course of conduct' that endangered the child's physical and emotional well-being is required," *Williams v. Williams*, 150 S.W.3d 436, 450 (Tex. App.—Austin 2004, pet. denied) (quoting *Texas Dep't of Human Servs. v. Boyd*, 727 S.W.2d 531, 534 (Tex. 1987)); *see In re M.D.M.*, 579 S.W.3d 744, 764 (Tex. App.—Houston [1st Dist.] 2019, no pet.).

We review a trial court's best-interest determination in light of the considerations set out in *Holley v. Adams*, taking into account the children's wishes, their emotional and physical needs now and in the future, present and future emotional or physical danger posed to the children, the parenting skills of those seeking custody, any programs available to assist those seeking custody to promote the children's best interest, plans for the children's future, the stability of the home or proposed placement, conduct by the parent that might show that the parent-child relationship is inappropriate, and any excuses for the parent's conduct. 544 S.W.2d 367, 371-72 (Tex. 1976); *see E.N.C.*, 384 S.W.3d at 807. The *Holley* factors are not exhaustive, not all factors must be proved, and "[t]he absence of evidence about some of these considerations would not preclude a factfinder from reasonably forming a strong conviction or belief that termination is in the child's best interest, particularly if the evidence were undisputed that the

parental relationship endangered the safety of the child." *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002).

The children's need for permanence is the paramount consideration when determining their present and future physical and emotional needs. *L.R. v. Texas Dep't of Family & Protective Servs.*, No. 03-18-00125-CV, 2018 WL 3059959, at *1 (Tex. App.—Austin June 21, 2018, no pet.) (mem. op.); *In re D.R.A*., 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.). There is a strong presumption 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). A parent's rights may not be terminated merely because the children might be better off living elsewhere, but the factfinder may consider whether termination and adoption versus an impermanent foster-care arrangement would better serve the children's best interest. *See L.R.*, 2018 WL 3059959, at *1.

When reviewing the evidence, we must "provide due deference to the decisions of the factfinder, who, having full opportunity to observe witness testimony first-hand, is the sole arbiter when assessing the credibility and demeanor of witnesses." *In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014); *In re J.P.B*., 180 S.W.3d 570, 573 (Tex. 2005). In evaluating legal sufficiency, we look at "all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *In re J.F.C*., 96 S.W.3d 256, 266 (Tex. 2002); *Williams*, 150 S.W.3d at 449. We "assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so" and "disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible," *J.F.C*., 96 S.W.3d at 266, but we need not disregard undisputed evidence contrary to the determination, *K.M.L*., 443 S.W.3d at 113. If after reviewing the evidence, including undisputed evidence that does not support the findings, we conclude that no reasonable

factfinder could have formed a firm belief or conviction that the Department carried its evidentiary burden, the evidence is legally insufficient. *J.F.C.*, 96 S.W.3d at 266; *Williams*, 150 S.W.3d at 449. In considering factual sufficiency, we review the entire record and ask whether the "disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding." *J.F.C.*, 96 S.W.3d at 266. If the disputed evidence that could not be credited in favor of the finding is so significant that a reasonable factfinder could not have formed a firm belief or conviction as to the truth of the Department's allegations, we will hold that the evidence is factually insufficient. *Id*.

## DISCUSSION

In her first issue, E.R. argues that the evidence is legally and factually insufficient to support the trial court's finding of endangerment and its finding that termination is in the children's best interest. *See* Tex. Fam. Code § 161.001(b)(1)(E), (2). In her second issue, she contends that the trial court erred in barring E.R. from questioning the children's guardian ad litem about conservatorship as an alternative to adoption.

*Statutory Grounds*

The Department's removal affidavit alleged that in 2017, while Ann and her younger half-siblings were present in the parties' cars, E.R. and Eliza assaulted Ann's father; E.R. tried to run John over, wrecking his car in the process; and Eliza backed her own car into John's. Ann was frightened by the incident. The fact that Marie and Max were not present or directly endangered by that incident does not bar us from considering that incident as it relates to the younger children's safety. *See Boyd*, 727 S.W.2d at 533. E.R. twice tested positive for amphetamines and methamphetamine during the monitored return, tested positive for marijuana

about ten times between January 2018 and August 2019, and missed more than fifteen tests in that same time frame. E.R. disputed the methamphetamine and amphetamine test results, testified that she had never used those drugs, and asserted that she told the Department about certain medications she was taking, but she did not provide any evidence about what those medications were or whether they can in fact lead to false positives.

After the return was disrupted in late July, E.R. stopped communicating with the Department, stopped taking drug tests, and ceased visitation with the children. Chris testified that Ann was confused, angry, and sad after the monitored return was disrupted. The Department's final report recited that E.R. had stopped therapy before being successfully discharged. The evidence supports findings that E.R. was involved in the altercation with John while Ann and other children were present, that E.R. used drugs in violation of her safety plan and during the monitored return, and that she did not complete therapy, which was intended to improve her mental health and parenting skills. Thus, we conclude that the evidence is legally sufficient to support a finding that E.R. engaged in conduct that endangered the children's well-being. *See* Tex. Fam. Code § 161.001(b)(1)(E).

When we consider all the evidence, deferring to the trial court's determinations of credibility, we likewise hold that the evidence is factually sufficient to support a finding of endangerment under Subsection (E).

The 2017 incident, as described by the Department's summary of the police investigation and its interviews with John and Dawn, was a violent one that occurred in the presence of Ann and her younger half-siblings. Indeed, the children were in the respective cars during the altercation. Although E.R. disputed the Department's version of the incident and testified that security camera footage did not support John's allegations, the trial court was

tasked with weighing her credibility and could have determined she was not credible. *See A.B.*, 437 S.W.3d at 503.

In addition to that altercation, E.R. missed numerous drug tests, continued to test positive for marijuana use throughout the proceeding, and tested positive twice for methamphetamine and amphetamine. Although E.R. testified that the positive tests during the monitored return resulted from earlier use and denied using methamphetamine or amphetamine, we must defer to the trial court's credibility determinations. *See id*. We cannot overlook the fact that the Department felt it was appropriate to return the children to her care under a monitored return, but neither can we somehow consider that fact to be binding on the trial court in its evaluation of the facts. Caseworker Jones was concerned about the children's safety largely because of E.R.'s positive methamphetamine test results, as was the children's guardian ad litem. And the Department's removal affidavit also noted earlier allegations related to concerns about E.R.'s parenting, including the 2010 report about E.R. being admitted for psychiatric treatment and the 2014 report describing the incident leading to E.R.'s arrest for burglary of a habitation; both of those incidents occurred in the presence of one of E.R.'s children.

In light of E.R.'s failure to complete therapy; her numerous positive and missed drug tests; and the violent altercation that began this case and the two earlier incidents, all three of which occurred while children were present, we hold that the evidence is factually sufficient to show that E.R. engaged in a course of conduct that endangered the children's physical and emotional well-being. *See* Tex. Fam. Code § 161.001(b)(1)(E); *Williams*, 150 S.W.3d at 450-51; *M.D.M.*, 579 S.W.3d at 764.

*Best Interest*

We reach a similar conclusion as to best interest, holding that the evidence supporting the trial court's finding is both legally and factually sufficient, if by a slim margin.

Chris testified that he and his wife wanted to adopt the children; that they could provide the children with a stable environment; and that the children would have better stability in his home than with E.R. He also said that Ann was confused and saddened by the situation and that Max, who had lived with Chris for most of his life, preferred Chris to E.R. and wanted to stay with Chris and his wife. Chris testified that the children were thriving in his care and doing "much better" in school. Chris believed that E.R. had placed her own desires above the children when she decided to cease contact with the Department, resulting in visitation being cut off. Finally, he explained that he believed adoption would be better for his family than primary managing conservatorship because of the financial assistance they would receive. Both Jones and Rothas believed that the children's best interest would be best served by termination and adoption by Chris and his wife. Indeed, E.R. herself wanted the children to stay with Chris if they were not placed with her.

The Department's evidence about the 2014 incident with E.R. and her sisters and about the more recent altercation between E.R. and John—both of which took place while children were present—shows that E.R.'s conduct in her children's presence was sometimes inappropriate and violent. Ann was "very scared" by the incident between her parents, and she told the Department investigator that E.R. and Eliza had told her John "was lying about everything" and that she should not tell anyone about the wreck. Although E.R. denied that the altercation with John had happened the way the Department alleged, it was for the trial court to consider whether her testimony was credible. *See A.B.*, 437 S.W.3d at 503.

The record does not reflect that any of the children have special needs, nor was there evidence presented about E.R.'s conduct during visitations. We recognize that the Department determined that a monitored return was appropriate, a factor that weighs in favor of E.R., but the evidence also shows that E.R. continued to test positive for drugs throughout the return and that after the return was disrupted, she ceased drug testing and stopped communicating with the Department. Further, the Department introduced into evidence its final report, which summarized statements by E.R.'s therapist and the doctor who conducted E.R.'s psychological evaluation. The psychologist reported that E.R.'s "ability to appropriately parent her children is impaired by her criminal history and poor judgment," that she was not forthcoming about her history, that she had borderline intellectual functioning, and that she should participate in therapy until being discharged by her therapist. E.R.'s therapist said that E.R. was "on the right path" but had "stopped attending counseling for no reason." According to the Department, E.R. was incarcerated for about three months in 2018, she moved residences in May 2019, and the Department did not know if she still lived there "as she has reported she does not want to have any contact with the Department." E.R. testified that she was about to start a new job. She also testified that she was not employed between December 2017, when the case started, and February 2019; she said she lost that job in August 2019 because of court appearances. E.R. did not testify about her current living situation or its stability.

We recognize that the Department has the burden to overcome the presumption in favor of preserving the parent-child relationship by presenting clear and convincing evidence that termination was in the children's best interest, *see E.N.C.*, 384 S.W.3d at 807; *R.R.*, 209 S.W.3d at 116, and we caution the Department that the evidence it presented relevant to that issue is spare at best. However, bearing in mind (1) the trial court's role in determining witness

credibility and the weight to be given the evidence, *see A.B.*, 437 S.W.3d at 503; (2) the applicable standards of review, *see J.F.C.*, 96 S.W.3d at 266, *C.H.*, 89 S.W.3d at 27; and (3) the fact that the children's need for permanence is our primary consideration in determining their present and future physical and emotional needs, *see L.R.*, 2018 WL 3059959, at *1, we cannot hold that the trial court could not have formed a firm belief or conviction that termination of E.R.'s parental rights was in the children's best interest. We thus hold that the evidence is legally and factually sufficient to support the trial court's best-interest determination.

*Evidentiary Ruling*

In her second issue, E.R. insists that the trial court erred in sustaining the Department's objection to a question she sought to ask the guardian ad litem. "The trial court has extensive discretion in evidentiary rulings, and we will uphold decisions within the zone of reasonable disagreement." *Diamond Offshore Servs. Ltd. v. Williams*, 542 S.W.3d 539, 545 (Tex. 2018). Any error is reversible only if the appellant can show that the error was harmful, meaning that it probably caused the rendition of an improper judgment, *id*., and when the court excludes evidence, "a party must preserve error by filing an offer of proof informing the court of the substance of the excluded evidence," *Gunn v. McCoy*, 554 S.W.3d 645, 666 (Tex. 2018).

E.R. asked Rothas, "Can they not achieve permanency if [Chris and his wife] were named managing conservator?" Rothas started to answer, "The grandparents and I have discussed that. Initially that was—they kind of initially thought that, but with the new drug use of mom—," at which point E.R. objected that the answer was nonresponsive. The trial court asked E.R. to restate her question, and E.R. asked, "Could the children obtain permanency if the grandparents are named as joint managing conservators?" The Department then objected,

"Relevance. Calls for legal conclusion," and the trial court sustained the objection. E.R. passed the witness and did not attempt to ask any further questions.

E.R. argues that Rothas should have been allowed to testify about her discussions with Chris about conservatorship as opposed to adoption. However, she did not make an offer of proof as to what Rothas would have testified to and thus did not preserve any error related to the trial court's sustaining the Department's objection. *See* Tex. R. Evid. 103; *Gunn*, 554 S.W.3d at 666; *McKinnon v. Wallin*, No. 03-17-00592-CV, 2018 WL 3849399, at *4 (Tex. App.—Austin Aug. 14, 2018, pet. denied) (mem. op.) ("As to McKinnon's complaint that he was not allowed to cross-examine appellees' witnesses, he has failed to preserve this complaint for our review because he did not make an offer of proof concerning the substance of what the excluded testimony would have been."). As we have explained,

> While the reviewing court may sometimes be able to discern from the record the general nature of the evidence and the propriety of the trial court's ruling, we cannot, without an offer of proof, determine whether exclusion of the evidence was harmful. Thus, when evidence is excluded by the trial court, the proponent of the evidence must preserve the evidence in the record in order to complain of the exclusion on appeal. If the party fails to make an offer of proof, it must introduce the excluded testimony into the record by a formal bill of exception. Failure to demonstrate the substance of the excluded evidence through an offer of proof or bill of exception results in waiver of any error in its exclusion.

*B.O. v. Texas Dep't of Family & Protective Servs*., No. 03-12-00676-CV, 2013 WL 1567452, at *3 (Tex. App.—Austin Apr. 12, 2013, no pet.) (mem. op.) (citations omitted). E.R. thus waived any error in the trial court's limiting her questioning of Rothas.

Even if E.R. had preserved error, she has not shown that the alleged error probably caused an improper judgment or probably prevented her from properly presenting her case to this Court. *See* Tex. R. App. P. 44.1(a); *Davidson v. Great Nat'l Life Ins. Co.*, 737

S.W.2d 312, 314 (Tex. 1987) (citing predecessor to rule 44.1(a)). First, although E.R. asserts that she sought Rothas' testimony to investigate whether the children could obtain permanence and stability through Chris being named managing conservator and whether Chris was making an informed decision about the need to terminate E.R.'s rights, when Rothas started to provide an answer about her discussions with Chris on the issue, it was E.R. who objected to the answer as nonresponsive. Further, we note that E.R. asked why Chris preferred termination and adoption over being named primary managing conservator (PMC) and that he answered:

> I [did] ask [E.R.], look, we do the PMC. I don't know too much about it because I really want to sit down and talk to somebody about it with her doing it. She says, Well, I help you more or whatever. Then I look back. I said, Okay, we've been having them going on two years or whatever. Now I tell her, can you at least help me with some child support. I know she's been jumping with different jobs. My thinking is looking at the future on what can happen if I do have them. She said that she can apply to, you know, to help that I need with them because it is hard. And like I said, my wife right now—she took her lesser job just to help, you know, get them to doctor's office, get them to school, so forth. So I'm basically the main provider, you know, the major provider of the household. That's with the mortgage, the insurance, making sure we have vehicles to get them to the place and so forth. I was telling my daughter she could do that. But you know she claims she can do it. And I'm not saying that she can't. But I'm just looking at what's been happening. I haven't received anything from it. But like I said, I'm here to just—for the Court.
>
> [E.R.]. So your reasoning if I'm—I don't want to put words in your mouth—
>
> A. Yes.
>
> [E.R.]. I'm trying to understand. Is your main reason for wanting to adopt the kids is financial purposes for their support? Is that—
>
> A. Yeah, more help for them.

Thus, there was evidence presented about the issue of managing conservatorship versus termination and adoption, and E.R. has not explained what other information might have been produced.

On this record, E.R. has not shown that the trial court abused its discretion in limiting the questions she sought to ask of Rothas. We overrule E.R.'s second issue on appeal.

## CONCLUSION

We have held that the evidence is legally and factually sufficient to support the trial court's findings of statutory grounds for termination and that termination is in the children's best interest. We have also overruled E.R.'s evidentiary complaint. We therefore affirm the court's termination decree.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Baker and Triana

Affirmed

Filed: July 7, 2020