AFFIRMED; Opinion Filed November 3, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00779-CV

IN THE INTEREST OF A.C.D., L.M.D., AND L.M.D., CHILDREN

On Appeal from the 296th Judicial District Court
Collin County, Texas
Trial Court Cause No. 296-30073-2016

MEMORANDUM OPINION

Before Chief Justice Wright, Justice Bridges, and Justice Lang
Opinion by Justice Lang

Following a bench trial, the trial court signed a final order respecting conservatorship of minor children A.C.D., L.M.D., and L.M.D. (collectively, "the children"). Specifically, the trial court appointed the father of the children ("Father") sole managing conservator and appointed the mother of the children ("Mother") as a possessory conservator with the right to supervised visitation at certain times and locations.

In a single issue on appeal, Mother contends the trial court abused its discretion by not appointing her as a joint managing conservator of the children. We decide Mother's issue against her. The trial court's judgment is affirmed.

I. FACTUAL AND PROCEDURAL CONTEXT

Addressing the parties' arguments on appeal requires an analysis of all the evidence pertaining to numerous factors respecting the best interest of the children. Accordingly, we recount the underlying facts in a detailed, granular manner. On November 26, 2014, the Texas

Department of Family and Protective Services ("the Department") filed the lawsuit from which this severed case originated. At that time, A.C.D. was five years old and L.M.D. and L.M.D., who are twins, were three years old. The children resided with Mother and her three additional children,[1] eleven-year-old T.J.D., nine-year-old E.A.D., and one-year-old C.M.D. Also, C.M.D.'s father, Troy, and two of Troy's children from another relationship resided with them. The Department sought immediate possession and temporary managing conservatorship of all six of Mother's children based on facts contained in several affidavits attached to the petition. Those affidavits alleged, among other things, neglectful supervision of E.A.D. and medical neglect as to all six children. Mother filed a general denial answer.

After a hearing, the trial court signed a January 15, 2015 order in which it appointed the Department temporary sole managing conservator of all six children and removed them from Mother's care. Mother was named a possessory conservator with the right to supervised visitation. All six children were initially placed in foster care for several weeks and then placed with relatives of Mother. In approximately June 2015, after a "status" hearing at which Father appeared and requested that his three children be placed in his care, the trial court ordered a monitored placement of those three children with Father. Mother remained a possessory conservator of all six children and they spent weekends at her home.

On July 7, 2015, Mother filed a "Motion for Further Temporary Orders" in which she requested a monitored return of all six of her children. During a July 13, 2015 hearing on that request, Mother testified, in part, (1) at the time her children were removed, she was not employed; (2) she is currently employed at Wal-Mart; (3) she currently works an "overnight shift" from 10 p.m. to 7 a.m., but is planning to switch to working "days"; and (4) her mother and grandmother will watch the children while she works during the day. Following that

[1] Mother's three additional children each have other fathers, none of whom is a party to this appeal.

hearing, the trial court signed an August 13, 2015 order providing that, pending trial, (1) the Department was to continue to serve as temporary managing conservator of all six of Mother's children; (2) the three children in this case were to remain in the monitored placement with Father; and (3) Mother's other three children were to be placed in a monitored placement with Mother.

A bench trial respecting conservatorship of the three children in this case was held on December 21, 2015. During opening statements, counsel for the Department stated in part (1) Mother's three children who had begun a monitored placement with her in August 2015 had been removed from her again and currently were not in her care and (2) the Department recommended that the children in this case remain in Father's care "full time" with supervised possession by Mother. Further, the children's attorney ad litem stated (1) he joined in the Department's recommendation because Father "is the more stable parent and has more stable employment, more stable residence, and the children right now are fine with [Father]" and (2) Mother "is not as stable as we would like to see her" and should be allowed, at most, only supervised visitation. Counsel for Mother stated in part (1) Mother was requesting that the children be returned to her or, alternatively, that she be given unsupervised possession during visitations; (2) Mother "feels like" the children are in danger with Father; (3) there is evidence Father has "disobeyed a number of" the trial court's orders; and (4) although Father "has done some good things in this case for his children," the evidence shows "these two parents don't work well together."

Devyn Grigsby testified at trial that she is employed in the Department's "investigations division." In September 2014, she was assigned to investigate a referral respecting Mother. Grigsby stated the "original referral" contained allegations that E.A.D. was underweight and physically abused. Specifically, according to Grigsby, E.A.D. "made an outcry that [Mother]

had spanked her with a belt, dragged her by her hair, spanked her with a cord, held her head under the shower like when the water's coming, held her face up to the shower and then put a towel over her head." The Department (1) arranged for four of Mother's six children, including two of the children in this case, to be "forensically interviewed" at the Collin County Children's Advocacy Center and (2) asked Mother to take all six children to the "REACH Clinic" ("REACH") at Children's Medical Center to be "evaluated." Grigsby testified the information gathered by the Department raised "concerns for medical neglect." Based on that information, the Department began legal proceedings to obtain an order requiring Mother to participate in "Family Based Safety Services." However, Grigsby stated, the Department had "concerns" because Mother had been required to complete such services in a "previous case" and "there were issues" in that case. Grigsby testified that "based on the previous information and the previous history we were not able to move forward with an order to participate [in services]" and therefore the decision was made to file the petition described above. Additionally, advocates were appointed for all six children through Court Appointed Special Advocates of Collin County ("CASA").

While the Department awaited a hearing respecting the petition, its investigation continued and more "concerns" arose. According to Grigsby, (1) A.C.D. was prescribed medication for asthma, but Mother "decided . . . she was going to stop [A.C.D.'s] asthma medication without the doctor's permission"; (2) E.A.D. was "supposed to be taking several medications" for epilepsy, but "it was learned that she was only taking one"; (3) there were school attendance issues as to the school-aged children, including multiple "tardies" and absences of A.C.D., E.A.D., and T.J.D. because Mother "couldn't round up the crew to get them to school"; (4) there was a "very chronic problem" respecting all six children missing scheduled doctor appointments or having those appointments cancelled by Mother; (5) the children were

"complaining they don't have enough food at the house"; (6) T.J.D. "had too much responsibility as far as having to take care of the younger ones"; and (7) "the children were being told not to communicate with [the Department] and to keep secrets."

Additionally, Grigsby testified (1) upon removal of the children, Mother "refused to give any information" respecting her relatives and stated she did not know how to contact Father or any of Father's relatives and (2) as a result, the children spent several weeks in foster care before the Department was able to place them with relatives. Grigsby stated she observed some of Mother's visits with her six children while they were in foster care. According to Grigsby, (1) Mother told E.A.D. and T.J.D. "not to eat the foster mom's food, that it was poison" and, as a result, "they refused to eat"; (2) it appeared to Grigsby that Mother was "playing mind games with her children"; and (3) Mother's behavior constituted "emotional abuse." Grigsby testified Mother was subsequently asked by the Department to participate in a specific set of services designed to help her achieve reunification with her children and she agreed to do so. Further, Grigsby stated (1) Mother was asked to take a drug test during the investigation and "did test positive for barbiturates"; (2) that positive drug test result has not been "alleviated" and no records have been produced by Mother to explain that result; (3) while Grigsby was transporting A.C.D. to the foster home, he "just started talking" and told Grigsby that Mother "sits on him and cusses at him"; (4) part of Mother's explanation for the school attendance issues was that "the school may have gotten it wrong"; and (5) although Mother told the Department she did not know how to reach Father or his relatives, the Department later learned Father's sister lived next door to Mother at the time the children were first removed and Father had been at Mother's home delivering presents to the children on the date the Department petitioned for removal.

On cross-examination, Grigsby testified the January 2015 removal of Mother's six children was based on "multiple issues," including "the issues with [E.A.D.], the medications,

the fact that [Mother] was telling the children not to speak to CASA, not to speak to us." Further, according to Grigsby, (1) prior to the removal of the six children, the Department was "told by medical staff that they believed [E.A.D.] was not getting her medications," and (2) after removal of the children, testing showed "[E.A.D.'s] seizure medication levels were practically nonexistent which says that she was not getting her medication." Additionally, Grigsby testified the physical abuse alleged by E.A.D. was denied by Mother and was not corroborated by any of the other children.

On redirect examination, Grigsby testified "additional outcries" were made during the Department's investigation prior to removal of the six children. Specifically, Grigsby stated in part that T.J.D. and E.A.D. told the Department that Mother "made them watch a movie about a child that was placed in an oven by a caseworker or something to that extent, that that could happen to them if they keep talking to [the Department] and CASA."

Bethany Malack testified she is employed by the Department and is the "conservatorship worker" assigned to this case. She stated that part of her role was to develop a "family plan of service" so Mother could "access services to help alleviate the Department's concerns." According to Malack, Mother's original family plan of service included "parenting classes, psychological evaluation, anger management, . . . maintain stable housing, employment." Also, Mother was asked to complete counseling individually and with her two oldest children. Malack testified (1) Mother "did not seem to be that successful up and to that point" in parenting her six children and was "seemingly overwhelmed"; (2) Mother successfully completed several of her services, but when the children were placed with Father, "[Mother] seemed to lose focus on what she can do to make changes to be a better parent and her responsibility in this case, and the focus seemed to predominantly shift to his faults and what he's done wrong and what he needs to change"; (3) Mother expressed concerns about "the safety of her children being with [Father],"

which concerns were investigated by Malack; and (4) "[a]ll of the concerns that [Mother] had, there didn't seem to be any concerns once we looked into them after speaking to day care providers, teachers, medical professionals, seeing the children in the home weekly, staffing with CASA, talking to their counselor." Specifically, Malack testified Mother's concerns included (1) the children had "bug bites" and (2) Mother believed Father was "physically disciplining" the children. Malack stated that after investigating, she learned (1) the children had contracted some insect bites, for which Father sought appropriate medical attention, and (2) "no physical discipline was taking place." Additionally, Malack stated Mother (1) "said that she had concerning recordings and videos that would show that the children were being treated not well with [Father], but she said that she did not trust the Department to address her concerns so she wasn't going to share those with me" and (2) "did play me one recording over the phone of [A.C.D.] talking," but the statements in that recording were not "concerning." Further, Malack testified that on several occasions, Mother took the children to the emergency room during her visitation time because she had "concerns" respecting conditions for which the children had already been seen by a doctor and prescribed medication.

Malack testified Mother (1) quit her job shortly after the monitored placement of her three other children commenced in August 2015, (2) subsequently was evicted from the house where she resided at that time, and (3) was currently unemployed and living in a two-bedroom apartment with her mother and grandmother. Malack testified she did not tell Mother that she needed to "quit her job working nights" and was not aware of anyone from the Department telling Mother to do that.

Further, according to Malack, on December 11, 2015, C.M.D., T.J.D., and E.A.D. were removed from the monitored placement with Mother because C.M.D. sustained burns from an iron and the pediatrician who treated those burns made a referral to REACH "[t]o determine if

there was abuse involved." Malack stated she was present at the pediatrician's office on that date with Mother, C.M.D., and E.A.D. She stated Mother was "very angry" that those children were again being removed from her and "was also yelling about [Father]." Malack stated she (1) was concerned about Mother's behavior because "it was in front of the children" and (2) asked Mother "not to focus on [Father]," but rather on C.M.D. and the two other children who were being removed. Also, Malack testified (1) T.J.D. and E.A.D. had been absent from school several times in the past few weeks; (2) it appeared to her Mother "was having trouble getting the children to school since she'd been evicted from her home"; and (3) approximately one week prior to the December 11, 2015 removal of the three other children, the Department received a referral based on allegations of "possible drug use" by Mother. According to Malack, (1) Mother was asked to take a drug test after that referral was received and she did so, (2) "the drug test was positive" for codeine and morphine, and (3) Mother was asked to provide the Department with documentation respecting her current prescriptions, but the Department did not receive any such documentation prior to trial. Malack stated (1) Mother has not "demonstrated a sufficient change in her behavior"; (2) the Department's original concerns respecting Mother "seemed to be resurfacing"; and (3) she does not feel Mother is able to care for the children at this time because of her lack of stable employment, "the concerns with possible drug use," and "the instability of the home."

On cross-examination, Malack testified the doctor who evaluated C.M.D.'s recent burns did not believe the burns were intentional. Additionally, Malack stated that since July 2015, the police have been called to Mother's residence at least ten to fifteen times. According to Malack, (1) several of those calls involved conflicts between Mother and Troy, (2) one call involved Mother requesting assistance respecting a "tantrum" by T.J.D., and (3) there were several calls in which Mother "indicat[ed] that the children did not want to go with [Father]" and she "needed

help to get them out of the house to go be at the meeting location with [Father]." Further, Malack stated (1) Mother has blocked Father's phone number on her cell phone and calls the Department or CASA rather than communicating with Father respecting child care matters that are "between them two"; (2) there is "basically a lack of coparenting ability" respecting Mother and Father, which Malack "would attribute . . . more to [Mother]" than to Father; (3) Mother should have only supervised visitation with the children until the Department is able to "verify there are no drug concerns, see that she has stable housing and employment, [and] see some level of being able to work together"; (4) Father has a residence, stable employment, and an "adequate support network"; (5) she has visited with the children at Father's residence and the children are "doing great" there; and (6) she has no concerns about the children residing primarily with Father.

Linda Horton testified she has been a counselor for five of Mother's six children, including the three children in this case, from March 2015 to the present time. She stated (1) she "worked with the children about the transition into the home with [Father]," (2) the children are "doing very well in his care," and (3) she has no concerns about the care Father provides to the children and "would recommend they stay with him." On cross-examination, Horton stated (1) when she first began seeing the children, A.C.D. was "having a great deal of trouble" and "acting out a lot," but "got a lot better" in approximately the early summer and is now "doing really well"; (2) "[w]hen the children first went to be with [Father], they had a hard time every time they had to be changed, had to leave their mother," but now "they're very stable and doing well"; (3) none of the children have "indicate[d] that [Father] uses corporal punishment against them"; (4) Father "is a very serious and good parent from what I can see"; and (5) Mother "loves the children very much, and I think she's a bit overwhelmed." Further, in response to the trial court's question as to whether the children's visitation with Mother should be supervised or

unsupervised, Horton stated in part that "with everything that's happening to [Mother], . . . it would be more appropriate for someone to be present with her with the children."

Melinda Boylan testified she is a CASA volunteer and has been assigned to all six of Mother's children since January 2015. She sees the children at least twice a month. She stated it is CASA's position that the children should remain with Father because they "are doing very, very well there" and "[h]e's a very conscientious parent." Further, according to Boylan, (1) "there were some difficulties I think at some of the transfers initially," but "once [the children] got into [Father's] home, they were doing fine"; (2) CASA has "concerns" about placing the children primarily with Mother because it seems "having all six children is overwhelming for her"; (3) unsupervised visits with Mother would be appropriate if "the current [Department] investigations that are ongoing" are "satisfactorily completed"; and (4) Boylan has not "observed any other conditions or concerns" respecting Mother's household.

Father testified he and the children currently live in a three-bedroom apartment in McKinney. He works as a barber and a real estate agent and attends school. He stated he (1) loves the children and provides a safe and stable environment for them, including getting them to school on time each day; (2) believes the children "were being manipulated" by Mother; and (3) "was concerned for their mental well-being" when they were in Mother's care. He stated he first became aware that the Department had removed the children from Mother and placed them in foster care when he received a letter from the Department in February 2015. Prior to that, he had last seen the children in December 2014. He stated Mother did not know his address at the time the children were removed in January 2015, but "had contact" with him through Facebook, lived next door to his sister, and had his mother's address and phone number.

According to Father, (1) when Mother was pregnant with their first child, he "kind of distanced myself" because Mother "had a problem telling the truth"; (2) he had to call police for

his "own safety" during that time because when he "came back" to pay Mother some money he owed her, "[s]he threw a bicycle at my truck"; (3) he later had a "one-night stand" with Mother, after which she told him she was pregnant with twins and he was the father; and (4) he did not believe the twins were his because when he went to visit A.C.D. soon after the twins were born, a woman he did not know introduced herself as the twins' grandmother. Further, Father testified (1) during a different visit with A.C.D. in approximately 2010, Mother became upset because Father did not want to "stay the night" at her apartment; (2) Mother said to A.C.D., "[L]ook at your dad, look at him walking out of your life. Tell your dad, '[expletive] you'"; (3) Father told A.C.D. "[i]f you say these things to me, I'm going to pop you"; (4) A.C.D. repeated what Mother told him to say and Father "popped [A.C.D.'s] hand" to "teach him right from wrong"; (5) Mother got upset, started kicking Father, and at some point "pushed" A.C.D. to the ground; (6) Father "grabbed" Mother to "restrain" her; (7) Mother went to the kitchen and got a knife; (8) Father tried to "grab her, grab the knife" and they "wrestle[d] over the knife" until he noticed she was bleeding; and (9) at that point, Father "grabbed" A.C.D. and ran out the door "for safety." According to Father, as a result of that incident, he was arrested for violating his probation, but that arrest was "no billed" by a grand jury. He stated that in 2011, he learned the twins were his children and since that time he has "been doing everything I can to stay out of trouble, stay out of jail, and get myself together to be in a position to fight for custody of my kids and do what I'm supposed to do."

Additionally, Father stated he (1) was asking the trial court to appoint him managing conservator and appoint Mother as a possessory conservator with supervised visitation and (2) would prefer that the exchanges of the children occur in a public place rather than at his home. According to Father, A.C.D. told him that during a past visit with Mother, Mother "made" A.C.D. show her the house where Father lived at that time. Father stated he does not want

Mother to know where he currently lives because "[s]he's been violent with me in the past" and has "pulled weapons" and "thrown things." Further, Father testified he believes it is in the children's best interest to have only supervised visitation with Mother because of "excessive police contact," Mother's refusal to communicate with him by phone, concerns about drug use by Mother and alcohol use by Troy, and past instances of Mother "having the children lying for her." Father stated there were "times that she's had her older daughter [T.J.D.] call me and say that [the Department] is coming to take them away if I didn't get there right away or that the police were here right now," but upon his arrival at Mother's home "there's no police, there's no CPS, and [T.J.D.'s] like, 'My mom made me tell you that.'"

On cross-examination, Father stated that prior to the January 2015 removal of the children, he dropped off gifts and visited with the children each month. Also, he stated that since the children have been in his custody, (1) he has not used corporal punishment on the children and (2) no person with whom he is "having an intimate relationship" has spent the night at his home when the children were present. Further, he testified (1) he was convicted of "assault causing a bodily injury"[2] in approximately 2007; (2) he was placed on deferred adjudication for burglary of a habitation in approximately 2008; (3) he has had several other arrests that did not result in convictions; and (4) the most recent referral to the Department respecting drug use by Mother was made by him because he saw Mother speaking with a man at a local gas station and was later told by that man that Mother had been attempting to purchase illegal drugs from him.

Mother testified her mother recently signed a lease for an apartment for her and therefore she now has a place for the children to come and live with her. That apartment is located in McKinney and is in the same apartment complex where Troy currently lives. Also, Mother stated Troy recently purchased a van that the two of them will share. She testified she

[2] The record does not identify the complainant as to that assault.

understands (1) school tardiness and absenteeism will not be tolerated if the children are returned to her possession and (2) it is not the job of the police to "help exchange the kids" or to provide "discipline" as to her children.

Additionally, Mother stated she quit her previous job because it was her understanding that the Department wanted her to "quit working the nightshift." She stated (1) she is currently unemployed; (2) she has been "offered numerous jobs," but has not accepted any of those jobs because she needs daycare for C.M.D.; and (3) she has "constantly asked [the Department] who's supposed to watch [C.M.D.]," but the Department has "made no effort to help me with [C.M.D.'s] day care." She testified she is requesting that she be granted "unsupervised possession" or, alternatively, that the children "go with a family member where they're safe as far as physical [sic] and the violence that they are experiencing in [Father's] home." She stated her concerns about Father are based on "what the children are telling me." According to Mother, (1) approximately three weeks ago, "[t]hey told me that their dad made them hold heavy books, and he said that they were going to hold them until they fell asleep [and] when they would drop them or start crying, he'd pinch them in the nose, and they stopped—they couldn't breathe is what they said"; (2) the children "have marks on the lips when they were telling us that they were being popped in the mouth"; (3) L.M.D. has a "mark" on him that is "old" and appears to have been made with a belt; (4) on his most recent visit with Mother, A.C.D. told her "Daddy beat up Auntie Desha, and I got hurt"; and (5) "at this point from what I've seen and witnessed with everyone involved, I believe that [the Department and the other witnesses who have testified] refuse to see really what's going on or look into it."

On cross-examination, Mother testified (1) during the pendency of this case, she has taken only drugs prescribed to her; (2) the positive drug test results described above were caused by her prescription medications; (3) "today" she provided the Department with a "list of

prescriptions from CVS Pharmacy"; (4) she is willing to sign a "release" allowing the Department to obtain her hospital records respecting the medications prescribed to her; (5) she and Troy have not "cease[d] being boyfriend and girlfriend," but do not currently reside together because separate apartments are "best for our family size"; and (6) she is currently living off of money she received from a church and social security benefits of T.J.D. and E.A.D. Additionally, as to the burns received by C.M.D. at her grandmother's home, Mother testified she set the iron on a table after she finished using it and C.M.D. "squeezed through" the area near the table and was burned by the iron.

Troy testified he is the father of C.M.D. He stated (1) he has called police twice because of disturbances between him and Mother; (2) he has never seen Mother abuse her children; (3) he believes it would be in the children's best interest to return to Mother; and (4) the exchanges of the children are "chaotic" most of the time and it would be "a great idea" to structure the exchanges so Mother and Father do not have to "interact."

Following the presentation of evidence, the trial court stated it was rendering an "interim order" appointing Father as sole managing conservator of the children and Mother as a possessory conservator with supervised visitation for the next forty-five days. Further, the trial court stated it would (1) hold a "status" hearing in approximately forty-five days "to determine if we get a clean drug test, [and] if we have housing secure, employment secure" and (2) "enter a permanent order" at that time.

At the subsequent "status" hearing, Mother stated, in part, that she was not currently residing in the apartment her mother had leased for her. The Department recommended that Mother's visits with the children should continue to be supervised because Mother had not met her obligations to "obtain a job, obtain an apartment, and provide the Department with a signed release concerning that issue of the positive drug screen." At the conclusion of that hearing, the

trial court stated it "is going to follow the previous order, find that [Mother] has not complied with the [trial court's] order sufficiently to justify the lifting of supervised visitation with regard to [the children]."

The trial court signed a February 23, 2016 "final order" in which it stated that it finds (1) appointing Father sole managing conservator of the children is in the children's best interest and (2) the appointment of both parents as managing conservators would not be in the best interest of the children because "the appointment would significantly impair the children's physical health or emotional development." Mother filed (1) a timely motion for new trial, which was denied by operation of law, and (2) a March 14, 2016 notice of appeal. On April 28, 2016, this Court dismissed that appeal for lack of jurisdiction because the case in which the trial court's "final order" was rendered involved conservatorship of all six of Mother's children, but that order did not address conservatorship of T.J.D., E.A.D., and C.M.D. *In re A.C.D.*, No. 05-16-00308-CV, 2016 WL 1719097, at *1 (Tex. App.—Dallas Apr. 28, 2016, no pet.) (mem. op.). Therefore, this Court concluded, the trial court's judgment did not "dispose of all parties and claims." *Id.*

On May 5, 2016, Mother filed a motion in the trial court to sever the portion of that case pertaining to A.C.D., L.M.D., and L.M.D. That motion was granted by the trial court effective June 8, 2016, and "all relevant filings" were placed under the trial court cause number assigned to this severed case. A notice of appeal in this severed case timely followed.[3]

[3] This appeal is governed by the rules of appellate procedure for accelerated appeals. *See* TEX. R. APP. P. 28.4(a). Thus, the notice of appeal was required to be filed within twenty days after the judgment or order was signed. *See* TEX. R. APP. P. 26.1(b). "The appellate court may extend the time to file the notice of appeal if, within 15 days after the deadline for filing the notice of appeal, the party: (a) files in the trial court the notice of appeal; and (b) files in the appellate court a motion complying with Rule 10.5(b)." TEX. R. APP. P. 26.3; *see also* TEX. R. APP. P. 10.5(b) (governing contents of motions to extend time). The record shows Mother's June 30, 2016 notice of appeal in this case (1) was due on June 28, 2016, and (2) stated in part "notice of the severance does not appear to have been provided to [Mother's] Counsel until June 8, 2016 and notice of the new cause number does not appear to have been provided until June 12, 2016 after Counsel took efforts to locate said new cause number." Filed two days after the deadline, Mother's notice of appeal "implied a motion for an extension of time." *In re J.Z.P.*, 484 S.W.3d 924, 925 n.2 (Tex. 2016); *Hone v. Hanafin*, 104 S.W.3d 884, 887 (Tex. 2003) (applying *Verburgt v. Dorner*, 959 S.W.2d 615, 616–17 (Tex. 1997)); *see Coleman v. Kaufman Cty.*, No. 05-15-00877-CV, 2015 WL 5093276, at *1 (Tex. App.—Dallas Aug. 28, 2015, no pet.) (mem. op.) (stating in accelerated appeal that "[t]his Court implies a motion under rule 26.3 when a notice of appeal is filed in good faith during the time for filing a motion for extension"). The Department has not challenged the timeliness of the notice of appeal. *See In re J.Z.P.*, 484 S.W.3d at 925 n.2.

II. MOTHER'S ISSUE

A. Standard of Review

We review a trial court's decision on conservatorship for an abuse of discretion. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007); *In re D.S.B.*, No. 05-14-00950-CV, 2016 WL 4436377, at *4 (Tex. App.—Dallas Aug. 22, 2016, no pet.) (mem. op.); *In re R.R.*, No. 05-14-00773-CV, 2015 WL 5813391, at *6 (Tex. App.—Dallas Oct. 6, 2015, no pet.) (mem. op.). A trial court abuses its discretion when it acts in an arbitrary and unreasonable manner or without reference to any guiding principles. *In re R.R.*, 2015 WL 5813391, at *6 (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985)). Complaints about the legal and factual sufficiency of the evidence are not independent grounds for asserting error in conservatorship cases, but are relevant factors in deciding whether an abuse of discretion occurred. *In re J.G.L.*, 295 S.W.3d 424, 427 (Tex. App.–Dallas 2009, no pet.). Whether an abuse of discretion occurred depends on whether (1) the trial court had sufficient information upon which to exercise its discretion and (2) the trial court erred in the application of its discretion. *In re M.A.M.*, 346 S.W.3d 10, 14 (Tex. App.—Dallas 2011, pet. denied). A trial court does not abuse its discretion if some evidence of a substantial and probative character exists to support the trial court's decision. *In re M.P.B.*, 257 S.W.3d 804, 811–12 (Tex. App.—Dallas 2008, no pet.). In a bench trial, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *In re I.I.G.T.*, 412 S.W.3d 803, 806 (Tex. App.—Dallas 2013, no pet.). Additionally, this Court has stated that "the trial court is in the best position to observe the witnesses and their demeanor and, therefore, is given great latitude when determining the best interests of the children." *In re S.E.K.*, 294 S.W.3d 926, 930 (Tex. App.—Dallas 2009, pet. denied); *see also In re M.G.*, No. 05-15-00234-CV, 2016 WL 4120030, at *5 (Tex. App.—Dallas July 29, 2016, no pet.) (mem. op.) ("In custody matters, where personal observation and

evaluation of the parties is so valuable, we give great deference to the trial court's determination regarding conservatorship.").

B. Applicable Law

In Texas, the primary consideration in determining conservatorship and possession of and access to the child is the best interest of the child. TEX. FAM. CODE ANN. § 153.002 (West 2014); *In re V.L.K.*, 24 S.W.3d 338, 342 (Tex. 2000); *see also Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976) (identifying nonexclusive list of factors that may be considered in determining best interest).[4] The trial court may appoint a sole managing conservator or joint managing conservators. TEX. FAM. CODE ANN. § 153.005(a).[5] Further, section 153.131 of the family code provides,

> (a) Subject to the prohibition in Section 153.004 [which pertains to restrictions on conservatorship where there is a history of family violence or sexual abuse], unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.
>
> (b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.

Id. § 153.131. A party requesting sole managing conservatorship of a child has the burden to rebut the statutory presumption described in section 153.131(b). *Hinkle v. Hinkle*, 223 S.W.3d

[4] The factors listed in *Holley* are as follows: (1) "the desires of the child"; (2) "the emotional and physical needs of the child now and in the future"; (3) "the emotional and physical danger to the child now and in the future"; (4) "the parental abilities of the individuals seeking custody"; (5) "the programs available to assist these individuals to promote the best interest of the child"; (6) "the plans for the child by these individuals or by the agency seeking custody"; (7) "the stability of the home or proposed placement"; (8) "the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one"; and (9) "any excuse for the acts or omissions of the parent." *Holley*, 544 S.W.2d at 371–72.

[5] Amended by Act of Mar. 30, 2015, 84th Leg., ch. 1 (S.B. 219), § 1.043, eff. Apr. 2, 2015; Act of Mar. 30, 2015, 84th Leg., ch. 117 (S.B. 817), § 3, eff. Sept. 1, 2015 (current version at TEX. FAM. CODE ANN. § 153.002 (West Supp. 2015)). The citations to the Texas Family Code in this opinion are to the provisions in effect at the time this lawsuit was filed.

773, 779 (Tex. App.—Dallas 2007, no pet.) (citing *Lide v. Lide*, 116 S.W.3d 147, 152 (Tex. App.— El Paso 2003, no pet.)).

Additionally, section 153.134(a) of the family code provides that if a written agreed parenting plan is not filed with the trial court, that court may appoint the parents joint managing conservators "only if the appointment is in the best interest of the child, considering the following factors":

> (1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators;
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> (2) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;
>
> (3) whether each parent can encourage and accept a positive relationship between the child and the other parent;
>
> (4) whether both parents participated in child rearing before the filing of the suit;
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> (5) the geographical proximity of the parents' residences;
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> (6) if the child is 12 years of age or older, the child's preference, if any, regarding the person to have the exclusive right to designate the primary residence of the child; and
>
> (7) any other relevant factor.

TEX. FAM. CODE ANN. § 153.134(a); *see also In re M.G.*, 2016 WL 4120030, at *6 (concluding finding of family violence was not necessary to overcome section 153.131(b) presumption in favor of joint managing conservatorship, where section 153.134(a) factors weighed in favor of trial court's decision).

C. Application of Law to Facts

In her issue on appeal, Mother asserts the trial court abused its discretion by "failing to appoint [Mother], the primary care giver of the children, as a joint managing conservator." According to Mother, "the burden of the joint managing conservatorship presumption is not overcome" because (1) "little to no evidence was provided as to the specific needs of the

Children the Basis of Appeal as such, [sic] no weight can be given to this factor"; (2) "little to no evidence was provided as to the father's ability to provide welfare to the child although concerns were raised as to the mother"; (3) "the evidence suggested that the parents did have issues in terms of coparenting and neither parent provided an especially positive attitude of the other parent"; (4) "the evidence indicated that [Mother] had been the primary care giver of the children prior to the instigation of the suit"; (5) "the evidence indicated that the parties lived in close proximity to one another"; and (6) "the biological father and later appointed sole managing conservator of the children, had been arrested for and accused of assaulting [Mother], as well as other assaultive crimes."[6]

The Department responds that the trial court did not abuse its discretion by appointing Father as the children's sole managing conservator because the evidence shows (1) Mother has a "lengthy history of involvement with the Department," has tested positive for drugs both before and during this case, neglected the children's medical needs, failed to ensure the children attended school regularly, had her other children removed from her care after one suffered a severe burn, and failed to establish a stable home or employment, and (2) the children are doing very well in their placement with Father, are attending school, and have a stable place to live.

The parties do not assert, nor does the record show, that a "written agreed parenting plan" was filed with the trial court. *See* TEX. FAM. CODE ANN. § 153.134(a). Therefore, the trial court was required to consider the nonexhaustive list of factors in section 153.134(a) in determining the best interest of the children as to conservatorship. *See id.*; *see also In re R.R.*, 2015 WL 5813391, at *6–7; *In re M.G.*, 2016 WL 4120030, at *5–6. Mother cites and specifically addresses those factors in her appellate argument. Additionally, the Department cites *Holley* in

[6] The record does not show the trial court made any finding respecting a history of family violence. *See* TEX. FAM. CODE ANN. § 153.131. Further, in asserting her argument on appeal that "joint managing conservatorship" is proper in this case, Mother does not specifically complain as to the appointment of Father as a managing conservator of the children.

its appellate brief and addresses the factors described in that case, several of which overlap with the factors listed in section 153.134(a). *See Holley*, 544 S.W.2d at 372. We consider both sets of factors in our analysis.[7] *See In re J.R.*, No. 05-14-00338-CV, 2015 WL 4639625, at *5 n.2 (Tex. App.—Dallas Aug. 5, 2015, no pet.) (mem. op.) (citing *Holley* factors as being among additional factors that may be considered by courts in determining whether joint conservatorship is in best interest of child).

We begin by addressing together (1) the first factor in section 153.134(a), "whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators" and (2) the second and third *Holley* factors, i.e. "the emotional and physical needs of the child now and in the future" and "the emotional and physical danger to the child now and in the future." *See* TEX. FAM. CODE ANN. § 153.134(a); *Holley*, 544 S.W.2d at 372. Even assuming without deciding that this Court should consider only evidence pertaining to the three children in this case, the record shows Grigsby testified that prior to removal, (1) A.C.D. was prescribed medication for asthma, but Mother "decided . . . she was going to stop [A.C.D.'s] asthma medication without the doctor's permission," and (2) there was a "very chronic problem" respecting the children missing scheduled doctor appointments or having those appointments cancelled by Mother. Additionally, (1) Grigsby stated that when she was transporting A.C.D. to the foster home, he "just started talking" and told Grigsby that Mother "sits on him and cusses at him"; (2) three witnesses testified Mother is "seemingly overwhelmed" in caring for her children; (3) Father testified he believes the children "were being manipulated" by Mother and he "was concerned for their mental well-being" when they were in her care; and (4) Mother did not provide the requested documentation to explain the positive

[7] As described above, the sixth factor of section 153.134(a) is applicable only to children twelve years of age or older. *See* TEX. FAM. CODE ANN. § 153.134(a)(6). Because the three children in this case are under the age of twelve, we do not consider that factor.

results of her drug tests. Although some of the testimony described above was controverted by Mother and Troy, the trial court "is in the best position to observe the witnesses and their demeanor" and "is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *In re I.I.G.T.*, 412 S.W.3d at 806; *In re S.E.K.*, 294 S.W.3d at 930. Thus, the record supports a conclusion that the three factors in question weighed in favor of the trial court's decision. *See In re R.R.*, 2015 WL 5813391, at *7 (concluding that where evidence, although controverted, showed children's physical, psychological, and emotional needs and development would not benefit from appointing parents as joint managing conservators, first factor of section 153.134(a) weighed in favor of trial court's decision denying father status of joint managing conservator).

Second, we consider together the second factor in section 153.134(a), "the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest," and the fourth, sixth, and seventh *Holley* factors, i.e. "the parental abilities of the individuals seeking custody," "the plans for the child by these individuals," and "the stability of the home." The record shows Grigsby testified (1) prior to the removal of the children, there were school attendance issues as to the school-aged children, including multiple "tardies" and absences of A.C.D.; (2) upon removal of the children, Mother "refused to give any information" respecting her relatives and falsely stated she did not know how to contact Father or any of Father's relatives, which resulted in the children spending several weeks in foster care before the Department was able to place them with relatives; and (3) after Mother's three other children were returned to her, she was evicted from her residence and the school absences continued as to the children in her care. Further, Malack testified (1) Mother has blocked Father's phone number on her cell phone and calls the Department or CASA rather than communicating with Father respecting child care matters that are "between them two"; (2) when the children were

placed with Father, "[Mother] seemed to lose focus on what she can do to make changes to be a better parent and her responsibility in this case, and the focus seemed to predominantly shift to his faults and what he's done wrong and what he needs to change"; (3) there is "basically a lack of coparenting ability" respecting Mother and Father, which Malack "would attribute . . . more to [Mother]" than to Father; (4) Mother has called police numerous times with requests for help respecting managing her children; (5) Father has a residence, stable employment, and an "adequate support network"; and (6) the children are "doing great" with Father. Additionally, (1) Father testified he provides a safe and stable environment for the children, including getting them to school on time each day, and (2) Troy testified the exchanges of the children are "chaotic" most of the time and it would be "a great idea" to structure the exchanges so Mother and Father do not have to "interact." Thus, the record supports a conclusion that the four factors in question weigh in favor of the trial court's decision.

Next, we consider the third factor of section 153.134(a), "whether each parent can encourage and accept a positive relationship between the child and the other parent." As described above, Malack testified that when the children were placed with Father, "[Mother] seemed to lose focus on what she can do to make changes to be a better parent and her responsibility in this case, and the focus seemed to predominantly shift to his faults and what he's done wrong and what he needs to change," and (2) Mother continues to express concerns about "the safety of her children being with [Father]," even though the Department has investigated and found no bases for those concerns. Additionally, Father testified he believes the children "were being manipulated" by Mother. The record supports a conclusion that this factor weighs in favor of the trial court's decision.

Fourth, we consider together the first *Holley* factor, "the desires of the child," and the fourth and fifth factors of section 153.134(a), i.e. "whether both parents participated in child

rearing before the filing of the suit" and "the geographical proximity of the parents' residences." There is no evidence in the record specifically pertaining to the desires of the children as to conservatorship. Further, the record shows (1) prior to this lawsuit, the children resided with Mother and were visited by Father each month and (2) both Mother and Father live in Collin County and proximity is not a concern. Thus, the record does not show those three factors add any weight toward rebutting the presumption that Mother should be a joint conservator.

Finally, section 153.134(a)(7) allows for the consideration of "any other factor." TEX. FAM. CODE ANN. § 153.134(a)(7). The Department contends the evidence shows the remaining *Holley* factors weigh in favor of the trial court's decision, namely (1) "the programs available to assist these individuals to promote the best interest of the child"; (2) "the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one"; and (3) "any excuse for the acts or omissions of the parent." *Holley*, 544 S.W.2d at 372. As to "programs available," the record shows the Department has offered Mother at least two opportunities to complete services respecting her parenting of the children. However, Malack testified (1) Mother has not "demonstrated a sufficient change in her behavior" and (2) the Department's original concerns respecting Mother "seemed to be resurfacing." Further, as to the two other remaining *Holley* factors, the record shows Mother did not provide documentation as requested by the Department respecting her positive drug test results. Thus, these factors weigh in favor of the trial court's decision.

As described above, the trial court is given great latitude when determining the best interests of a child. *In re S.E.K.*, 294 S.W.3d at 930; *In re M.G.*, 2016 WL 4120030, at *5. Based on the record before us and the applicable factors described above, we conclude the trial court did not abuse its discretion by concluding that the statutory presumption in favor of appointing Mother as a joint managing conservator had been overcome. *See* TEX. FAM. CODE

ANN. § 153.131(b); *see also In re M.G.*, 2016 WL 4120030, at *6–7 (concluding presumption that joint managing conservatorship was in children's best interest was overcome where "several of [section 153.134(a)] factors weigh in favor of trial court's decision"); *In re R.R.*, 2015 WL 5813391, at *7 (same).

We decide Mother's issue against her.

III. CONCLUSION

We decide against Mother on her sole issue. The trial court's judgment is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF A.C.D., L.M.D., AND L.M.D., CHILDREN

No. 05-16-00779-CV

On Appeal from the 296th Judicial District Court, Collin County, Texas
Trial Court Cause No. 296-30073-2016.
Opinion delivered by Justice Lang, Chief Justice Wright and Justice Bridges participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 3rd day of November, 2016.