

**Reversed and Remanded and Opinion Filed May 31, 2018**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-17-00485-CV**

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**IN THE INTEREST OF J.L.W., A CHILD**

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**On Appeal from the 255th Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. DF-16-09294**

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**MEMORANDUM OPINION**

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

In this child custody case, Mother appeals the trial court's order appointing her joint managing conservator with Father and awarding Father the exclusive right to designate the residence of their child, J.L.W. In two issues, Mother asserts (1) a single act in violation of Texas Penal Code section 22.011 constitutes a "history or pattern of abuse" under Texas Family Code § 153.004; and (2) the trial court erred in denying her motion for new trial because she submitted an affidavit attached to her motion for new trial notifying the court its conservatorship order may violate section 153.004. *See* TEX. PENAL CODE ANN. § 22.011 (West Supp. 2017); TEX. FAM. CODE ANN. § 153.004 (West Supp. 2017). Because the trial court did not allow Mother to fully present her case, we sustain Mother's second issue, reverse the trial court's order, and remand this case for further proceedings consistent with this opinion.

## **BACKGROUND**

J.L.W. was born to Mother and Father in March 2011. J.L.W. lived with Mother from his birth until approximately the summer of 2013. By late August 2013, J.L.W. had begun living with Father, who was his primary caregiver through early 2016. In March 2016, Mother obtained physical possession of the child. The following month, Mother brought suit seeking appointment as sole managing conservator of J.L.W. Shortly thereafter, Father regained possession of J.L.W. and maintained possession through the course of the proceedings. No temporary orders were issued, and there was no discovery. Following a bench trial, the trial court entered a final order appointing the parties joint managing conservators.

Mother filed a timely motion for new trial, attaching her personal affidavit. In her affidavit, Mother, for the first time, explained that she was fourteen years old when she became pregnant with J.L.W. and Father was eighteen years old. At the hearing on the motion for new trial, Mother's counsel called Mother as a witness, but the trial court did not allow her to testify. The trial court denied Mother's motion for new trial. This appeal timely followed.

## **DISCUSSION**

Mother raises two issues, but we address only her second issue because it is dispositive of the appeal. In her second issue, Mother contends the trial court erred in denying her motion for new trial after she presented the court with evidence of a history of sexual abuse in her affidavit attached to the motion. Mother asserts the allegations should have prohibited Father from being appointed as a joint managing conservator of their child under Texas Family Code section 153.004.

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

We review a trial court's denial of a motion for new trial for an abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009) (per curiam). A trial court abuses its discretion if its decision is arbitrary, unreasonable, and without reference to any guiding

rules and principles, *Jelinek v. Casas*, 328 S.W.3d 526 (Tex. 2010), or is so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 661 (Tex. 2009).

### ***Applicable Law***

Under section 22.011 of the penal code, a person commits sexual assault when he has sex with a person who is under seventeen years of age. *See* TEX. PENAL CODE ANN. § 22.011(a)(2), (c)(1) (West Supp. 2017). The statute imposes strict liability on the actor when he is more than three years older than the victim. *See id.* § 22.011(e)(2); *Brown v. State*, 990 S.W.2d 759, 760 (Tex. App.—Austin 1999, not pet.) (actor was three years, eight months, and seven days older than victim and therefore not entitled to affirmative defense under statute). The Texas Family Code incorporates this statutory rape statute by reference in section 153.004.

A trial court may not appoint a parent as a joint managing conservator if the trial court receives credible evidence that the parent has committed a sexual assault in violation of penal code section 22.001 resulting in the other parent becoming pregnant with the child. *See* TEX. FAM. CODE ANN. § 153.004(b). Furthermore, a trial court may not grant such a parent access to the child unless the trial court finds (1) awarding access would not endanger the child's physical health or emotional welfare and would be in the child's best interest and (2) renders a possession order designed to protect the safety and well-being of both the child and the other parent, who was the victim of the sexual assault. *See id.* § 153.004(d, d-1).

### ***Application of Law to Facts***

Mother alleged in her motion for new trial that the trial court was not presented with evidence that Father's conduct violated Texas Penal Code section 22.011(a)(2), leading the trial court to enter an improper judgment under Texas Family Code section 153.004. In the attached affidavit, Mother states she was fourteen years old and Father was eighteen years old when they

began having sex with each other. Mother further asserts she was fourteen years old when she became pregnant with J.L.W. The facts alleged in the affidavit show a violation of section 22.011 of the Texas Penal Code if Mother was indeed under seventeen years of age and Father was more than three years older than her when she became pregnant with J.L.W. This alleged sexual assault, or abuse, is a necessary factor the trial court must consider in determining conservatorship.

The Texarkana Court of Appeals has addressed a situation on point with this case. *See In re M.B.D.*, 344 S.W.3d 1, 5 (Tex. App.—Texarkana 2011, no pet.). In *In re M.B.D.*, the trial court entered an order appointing the mother and the father as joint managing conservators, and the mother sought to amend that order by filing a motion for new trial with an attached affidavit. *Id.* at 3. The mother's affidavit detailed her sexual relationship with the father. *Id.* At the hearing on her motion for new trial, the mother was not allowed to testify. *Id.* The trial court only allowed argument from counsel, in which counsel stated the mother started having sex with the father when she was fourteen years old and the father was nearly twenty-one. *Id.* at 3–4. After the hearing, the mother filed a brief in support of her motion for new trial, citing section 153.004 of the Texas Family Code for the first time. *Id.* at 4. The court of appeals held the trial court was required to hear evidence on the mother's motion for new trial because her affidavit alleged facts which, if true, would have entitled her to a new trial. *Id.* at 5.

Like the appellant in *M.B.D.*, Mother in this case had no evidence on the record at trial relevant to family code section 153.004(b), although this crucial evidence was available at the time of the trial. Both appellant in *M.B.D.* and Mother later included allegations of sexual assault in violation of penal code section 22.011 in affidavits attached to their motions for new trial. Neither was allowed to testify at the hearing on their motion for new trial. In both instances, the trial court denied the motions for new trial although the motions alleged facts regarding the ages of the parties during their sexual encounters, which, if true, would have proven sexual assault entitling them to

a new trial. *Id.* (citing *Hensley v. Salinas*, 583 S.W.2d 617, 618 (Tex. 1979) (“When a motion presented a question of fact upon which evidence must be heard, the trial court is obligated to hear such evidence when the Motion for New Trial alleges facts, which, if true, would entitle the movant to a new trial and when a hearing for such purpose is properly requested.”)). Accordingly, we conclude that under these facts, the trial court was obligated to hear Mother’s evidence. Because the trial court did not allow Mother to fully present her case, its denial of Mother’s motion for new trial constituted an abuse of discretion. We sustain Mother’s second issue. In light of our disposition of Mother’s second issue, it is unnecessary to address her first issue.

We reverse the trial court’s order and remand this case to the trial court for further proceedings consistent with this opinion.

/Carolyn Wright/  
CAROLYN WRIGHT  
CHIEF JUSTICE

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**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

IN THE INTEREST OF J.L.W., A CHILD

No. 05-17-00485-CV

On Appeal from the 255th Judicial District  
Court, Dallas County, Texas

Trial Court Cause No. DF-16-09294.

Opinion delivered by Chief Justice Wright.

Justices Bridges and Evans participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant Alexandra Torres recover her costs of this appeal from appellee Sheldon Synclaire Williams.

Judgment entered May 31, 2018.