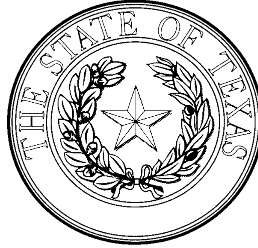
Opinion issued March 29, 2022



In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00261-CV

HADEN GABEL, Appellant

V.

TRACEY GABEL-KOEHNE, Appellee

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Case No. 2019-61608

O P I N I O N

Appellee Tracey Gabel-Koehne filed an application for protective order prohibiting appellant Haden Gabel from any and all contact with Gabel-Koehne's minor daughter, R.T.G. The trial court granted the protective order and required Haden's mother, Catherine Gabel, to pay attorney's fees. In six issues, Haden

argues that the trial court (1) erred in failing to make findings of fact and conclusions of law; (2) violated his right to due process; (3) abused its discretion by appointing an amicus attorney; (4) based the protective order on legally and factually insufficient evidence; (5) rendered an order that infringes on a third-party's parental rights; and (6) erred in requiring Catherine Gabel to pay attorney's fees. Because we conclude that the evidence was factually insufficient to support the trial court's order, we reverse the order and remand for further proceedings consistent with this opinion.

Background

Tracey Gabel-Koehne, as next friend of R.T.G. (born January 23, 2006), her minor daughter, applied for a protective order, naming Haden Gabel (also a minor at the time the application was filed, born April 30, 2002) as the respondent. In the application, Gabel-Koehne asserted that Haden engaged in conduct constituting family violence and sought a protective order prohibiting Haden from communicating with R.T.G. or going within 300 yards of any location where R.T.G. was known to be, among other measures. Gabel-Koehne also sought attorney's fees against Haden.

The application was accompanied by Gabel-Koehne's affidavit. Gabel-Koehne indicated that R.T.G.'s father, Gerard Gabel, was also Haden's grandfather. Gabel-Koehne asserted that in April 2019, R.T.G. reported that Haden

had sexually assaulted her on several occasions over the previous five years, beginning when she was eight and he was twelve, including forcing her to perform oral sex on him during a family vacation in Florida in 2014 and touching her vagina at Gerard's home just months before the application for protective order was filed. R.T.G. made her first statements to friends at a sleepover in April 2019. The Department of Family and Protective Services (DFPS) initiated its investigation later that same month, and Gabel-Koehne filed a police report on May 1, 2019. As part of this investigation, R.T.G. gave a forensic interview. DFPS determined that there was "reason to believe" R.T.G.'s allegations against Haden, but prosecutors involved in the criminal investigation declined to prosecute Haden. The police closed their investigation in August 2019.

On October 11, 2019, the trial court signed an order appointing an amicus attorney. The amicus attorney, Thao T. Tran, interviewed R.T.G., Gerard Gabel, Gabel-Koehne, and others. She also filed a motion asking the trial court to confer with R.T.G. "in the presence of the Amicus attorney only" and asking that "a record of the interview with the child subject to this suit be made and that the record of the interview be made a part of the record in this case."

On February 7, 2020, the trial court held a hearing on the application for protective order. Gabel-Koehne presented records from DFPS of its investigation into the allegations that R.T.G. made against Haden, and those documents were

admitted over Haden's hearsay objection. Ericka Davis, an investigator for DFPS testified that she was present when R.T.G. had her forensic interview at the Children's Assessment Center (CAC). During that interview, R.T.G. "made an outcry" that Haden came into her room at her dad's house and touched "her private area" while she pretended to be asleep. R.T.G. also reported that Haden "made her perform oral sex on him" on two occasions in 2014. The recording of the forensic interview itself was not admitted into evidence. Davis testified that DFPS concluded there was "reason to believe" R.T.G.'s allegations against Haden. DFPS created a family plan in which all parents, including Gerard Gabel and Gabel-Koehne and their current spouses, agreed that there was to be no contact between R.T.G. and Haden.

Family friend and part-time childcare provider to Gerard Gabel's younger children, Jennifer Ha, also testified that R.T.G. had informed her that something "illegal" happened between R.T.G. and Haden. Ha testified that the information from R.T.G. was "vague," but she "did not want to press her if she was uncomfortable."

Gabel-Koehne also testified regarding R.T.G.'s outcry at school and R.T.G.'s forensic interview at the CAC. Haden again objected that this testimony was hearsay, and the trial court overruled his objection, allowing Gabel-Koehne to testify regarding R.T.G.'s outcry statements. Gabel-Koehne testified that the

Bellaire Police Department "presented the charges to a panel of juvenile prosecutors" and chose not to accept charges against Haden. Gabel-Koehne testified that Gerard Gabel "has a very deep-rooted relationship with the City of Bellaire Police Department" and "employs many of their police officers . . . for private cash paying jobs as extra jobs for his private parties." Gabel-Koehne testified that she was seeking a protective order because "[s]everal incidents have occurred since [R.T.G.'s] outcry" that indicated that, "without this protective order, there's no way to prevent [further inappropriate sexual behavior by Haden] from happening." Gabel-Koehne testified that Gerard Gabel wanted to take R.T.G. on a family trip to Rome along with Haden, even after they had agreed that there should be no contact between R.T.G. and Haden.

Gerard Gabel testified that he understood R.T.G. first made her allegations against Haden at a sleepover with some friends from school. One of the girls reported this information to a parent, who then reported it to the school, and someone from the school contacted DFPS. Gerard stated that DFPS investigated by interviewing R.T.G. and members of the family, but he was not aware of any other information or evidence that supported R.T.G.'s allegations against Haden. He stated that the Harris County District Attorney declined to bring any charges against Haden. Gerard Gabel stated that he did not believe he could determine whether R.T.G. (his daughter)—who made claims of sexual assault—or Haden (his

grandson)—who denied them—was telling the truth, so he tried to remain unbiased. R.T.G. did not testify.

The trial court rendered its final protective order on February 25, 2020. The order stated that Haden Gabel appeared "by and through his mother, Catherine Theresa Gabel"[1] at the final hearing. The trial court found that Haden Gabel and R.T.G. are members of the same family, that Haden Gabel engaged in conduct that constitutes family violence, that "there are reasonable grounds to believe that the minor child [R.T.G.] is a victim of sexual assault pursuant to Texas Penal Code Sec. 22.021," and that Haden Gabel's acts "therefore constitute family violence." The trial court further found that "family violence is likely to occur in the future." Among other provisions, the order prohibited Haden Gabel from contacting or being within 300 yards of R.T.G., including prohibiting Haden Gabel from attending family functions with R.T.G. "when he will be left alone with [R.T.G.] in any manner" and from "attending family vacations with [R.T.G.] if he is to be left alone with [R.T.G.]."

Regarding attorney's fees, the final protective order provided:

> The Court finds that Catherine Theresa Gabel, the parent of the minor child Haden Joel Torres a/k/a Haden Gerard Gabel should be assessed attorney's fees in the amount of Twenty Three Thousand Forty Nine and 25/100 Dollars ($23,049.25) as attorney's fees for the services of Todd Frankfort. IT IS ORDERED that Todd Frankfort is awarded

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[1] This is the first mention of Catherine Gabel appearing on Haden's behalf. She was not named in any pleadings on file in this case.

> judgment of Twenty Three Thousand Forty Nine and 25/100 Dollars ($23,049.25) for legal services rendered. The judgment, for which let execution issue, is awarded against Catherine Theresa Gabel, as the parent of Haden Joel Torres a/k/a Haden Gerard Gabel.
>
> It is therefore, ORDERED that Catherine Theresa Gabel, on behalf of Respondent, shall pay or cause to be paid the sum of Twenty Three Thousand Forty Nine and 25/100 Dollars ($23,049.25) to the Law Office of Todd M. Frankfort, PLLC, 917 Franklin, Ste. 510, Houston, Texas 77002 on or before April 25, 2020.

The trial court also found that the amicus attorney "performed her duties and obligations as required in [section] 107.001, et seq., of the Texas Family Code in her service to the Court" and ordered that Catherine Gabel "as parent of Haden Torres a/k/a Haden Gerard Gabel" pay the amicus attorney's fees of $8,868.75.

The protective order stated that it "shall continue in full force and effect for the life of the Protected Person [R.T.G.]."

Haden Gabel filed his motion for new trial on March 5, 2020, arguing that appointment of an amicus attorney was improper because the application for protective order did not require a best interest determination and because it unnecessarily delayed resolution of the matter. Haden Gabel further asserted that the trial court abused its discretion in allowing R.T.G. "to testify during an ex parte meeting in chambers directly with the Honorable Judge of this Court and in the presence of the Amicus Attorney. This testimony was not subject to cross-examination, nor was the ex parte meeting transcribed by a court reporter despite objection by Respondent's [Haden Gabel's] counsel." Haden Gabel also made

several evidentiary complaints and asserted that the evidence was legally and factually insufficient to support the trial court's order.

The trial court denied the motion for new trial on March 16, 2020. Gabel filed a request for findings of fact and conclusions of law on March 17, 2020. No findings were filed, and so Gabel filed a notice of past-due findings of fact and conclusions of law on April 7, 2020. The trial court never filed findings of fact or conclusions of law beyond those that were included in the final protective order. This appeal followed.

Protective Order

Haden complains that the trial court erred in granting the protective order. In his second issue, he argues that the trial court erred in interviewing R.T.G. in chambers, without counsel other than the amicus attorney present, after the final hearing concluded. In his fourth issue, he asserts that the evidence was legally and factually insufficient to support the trial court's finding that he committed family violence and that family violence was likely to occur in the future. In his fifth issue, he argues that the protective order infringes on Gerard Gabel's parental rights.

A. Trial Court's Interview with R.T.G.

As part of his second issue, Haden argues that the trial court's in-chambers interview with R.T.G. was improper and constituted "ex parte communications."

He further argues that the trial court's interview with R.T.G.—taken without a record being made and without providing him an opportunity to rebut or respond to her testimony—deprived him of the right to confront and cross-examine her.

Gabel-Koehne argues that Haden failed to preserve his complaint about the trial court's interview with R.T.G. and, even if he did preserve it, the trial court acted within its sound discretion in how it admitted and considered the evidence. We disagree with both arguments.

Gabel-Koehne argues that Haden failed to preserve this complaint because he failed to object to the manner in which the trial court questioned R.T.G. and because he had an opportunity to provide "areas of examination for the trial court to ask" R.T.G. Gabel-Koehne is correct in asserting that, to preserve a complaint for appellate review, the record must show that (1) the complaint was presented to the trial court by a timely request, objection, or motion stating the specific grounds for the desired ruling if the specific grounds are not apparent from the context and (2) the trial court ruled on the request. TEX. R. APP. P. 33.1(a); *Guillory v. Boykins*, 442 S.W.3d 682, 689 (Tex. App.—Houston [1st Dist.] 2014, no pet.). "To be considered timely, the request, objection, or motion generally must be made at the earliest possible opportunity, thereby allowing the trial court an opportunity to cure the error." *Guillory*, 442 S.W.3d at 689 (citing *Tryco Enters., Inc. v. Robinson*, 390 S.W.3d 497, 505 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd) (stating, in

context of Rule of Appellate Procedure 33.1 and Rule of Evidence 103, that "the party must have made a timely, specific objection at the earliest possible opportunity")).

Gabel-Koehne's waiver argument, however, does not fully address the nature of the proceedings in this case. The amicus attorney, Tran, moved for the trial court to confer with R.T.G. in the presence of the amicus attorney only and to make a record of the interview to be included in the record of the case. At the final hearing on February 7, 2020, the trial court granted this request, stating, "We'll pick a date, Ms. Tran, when it's convenient for you to be here as well and the Court will confer with the child."

Haden's counsel then sought clarification:

> [Haden]: I guess, Your Honor, a clarification on that motion to confer. Since you are granting that motion and it will just be for clarification, [opposing counsel] and I will not be able to participate at or review other than a transcript—
>
> [Court]: I won't even allow you to review the transcript. I will seal it. That's a policy of my court. . . . Because I have the discretion to hear what the child has to say, if I believe the child would be in danger by allowing someone else to view it, then I can seal it, so.
>
> [Haden]: While I understand that to a degree, Your Honor, and I would never want any alleged victim to be placed in a situation that would be difficult for them, we would need to be able to find and determine the truth of what—an act actually occurred in the first place. And so the fact that Ms—

[Court]: Well that's up to me to decide. That's not up to you to decide.

[Haden]: But it's also my responsibility, Your Honor.

[Court]: Well sir, I'm not gonna argue with you about it. That's—that's what I do. And I'm allowed to use my discretion. . . . This is a pretty serious allegation and if I believe the child's gonna be in danger, future danger, I can tell you, I'm not gonna put that child at risk. I just won't do it."

[Haden]: I agree, Your Honor.

. . . .

[Court]: Okay. And anything else regarding that? You can certainly—you and [opposing counsel] are certainly able to submit topics that you want the Court to cover and I'll certainly cover those topics with the child but I will not—the only persons that will be in there will be the amicus attorney, myself and the court reporter. Okay? Anything else?

Based on this record, it appears that Haden's counsel expressed concern about the nature of the conference that the trial court intended to have with R.T.G., and he expected, at a minimum, to be able to review a transcript of the interview. The trial court rejected his concerns, but it also expressed its intention to interview R.T.G. first and then decide the extent to which Haden, as the respondent, and both parties' attorneys would be able to access the record of the trial court's examination of R.T.G.

At the conclusion of the hearing, the trial court again discussed its intention to confer with R.T.G. at the amicus attorney's request:

> [Court]: All right. So what I would like for the attorneys to do, if you have any questions or topics that you want me to cover or that you want Ms. Tran to cover, or while we're doing a conference, I would appreciate that you get them to me by say 11:30 on Monday, and that way I can rest assured that I can, you know, read them over before I go into—into the interview with the child, okay?
>
> [Haden]: How would you like us to get those to you, Judge?
>
> [Court]: Just email. . . .
>
> [Amicus]: And Your Honor, my apologies. If you were ready to rule today, then maybe the meeting would not be beneficial. But if you wanted to wait till after you to confer then—
>
> [Court]: Yeah. I'd like to talk to her. There are a couple of things I want to ask her. I—she's already been interviewed by the Children's Assessment Center so there are certainly things I'm not going to ask her because I'm—it's not beneficial. But there are a couple of things that I need to get clear, just in my own mind and so I would like to spend about—spend a few minutes with her and talk to her. Okay? . . . Any questions?
>
> [Haden]: Your Honor, for the purposes just of time frame, you're gonna speak with the applicant on Monday.
>
> [Court]: And I'll rule on—I'll rule after I talk to the child. . . . [I]f you all have any questions or you want me to bring you in, I'll be happy to do that as well. But you can just anticipate I'll email you my rendition, okay?
>
> [Haden]: Certainly.
>
> [Amicus]: Thank you, Your Honor.

Based on this exchange, it appears that the trial court intended to interview R.T.G. and rule after she conducted the interview. The trial court stated that if the parties had questions or if they wanted the trial court "to bring [them] in," they could do that.

Although the amicus attorney's motion to confer asked that a court reporter be present and the trial court indicated that a transcript of the interview with R.T.G. would be taken but possibly sealed, no record of that conference appears in the record. The trial court rendered its final order on February 25, 2020, and in his timely motion for new trial, Haden argued, in relevant part, that

> A new trial should be granted to Respondent because this Court abused its discretion in allowing Applicant, [R.T.G.], to testify during an ex parte meeting in chambers directly with the Honorable Judge of this Court and in the presence of the Amicus Attorney. This testimony was not subject to cross-examination, nor was the ex parte meeting transcribed by a court reporter despite objection by Respondent's counsel.

Given the facts of this case, we conclude that this ground asserted in the motion for new trial was sufficient to preserve Haden's complaint because it was his first opportunity to complain about the trial court's failure to make a record of the interview with R.T.G. and the failure to offer Haden an opportunity to rebut or otherwise address R.T.G.'s testimony before the trial court and the amicus attorney. At the end of the final hearing, it appeared that the trial court intended to have a court reporter present during her conference with R.T.G. It also appeared

that the trial court intended to allow the parties an opportunity to ask further questions or to appear again before the trial court following the interview with R.T.G. However, no record was presented to Haden following the interview, nor did he have an opportunity to rebut or otherwise address any statements R.T.G. made during the interview before the trial court rendered its order. Thus, Haden's motion for new trial was sufficiently timely to raise this objection. *See* TEX. R. APP. P. 33.1(a); *Guillory*, 442 S.W.3d at 689.

We further conclude that the trial court abused its discretion in conducting its interview of R.T.G. without making a record that would allow Haden to know what was said during the conference and without allowing Haden an opportunity to rebut or otherwise address any of R.T.G.'s testimony. Gabel-Koehne argues that the trial court acted within its sound discretion in examining R.T.G. as it did, and she cites authority for the proposition that the admission and exclusion of evidence is committed to the trial court's sound discretion. *See, e.g.*, *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012).

Gabel-Koehne cites Rule of Evidence 611, which provides in relevant part:

> (a) **Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
>
> (1) make those procedures effective for determining the truth;
>
> (2) avoid wasting time; and

> (3) protect witnesses from harassment or undue embarrassment.
>
> (b) **Scope of Cross-Examination.** A witness may be cross-examined on any relevant matter, including credibility.

TEX. R. EVID. 611(a), (b). Furthermore, the trial court had the inherent power to control the disposition of the case "with economy of time and effort for itself, for counsel, and for litigants." *State v. Gaylor Inv. Trust P'ship*, 322 S.W.3d 814, 819 (Tex. App.—Houston [14th Dist.] 2010, no pet.). This discretion, however, is not unfettered. *Id.* In exercising its judgment in this area, the trial court should "weigh competing interests and maintain an even balance." *Id.*

Here, the trial court's decision to interview R.T.G. in chambers, but not provide Haden, as the opposing party, with the opportunity to discover the nature of R.T.G.'s testimony or to rebut or otherwise address any statements made to the trial court did not constitute a reasonable exercise of discretion in weighing the competing interests and maintaining an even balance. *See id.* Thus, we conclude that the trial court abused its discretion in interviewing R.T.G. in chambers without providing Haden the opportunity to review or respond to any statements made during the interview. *See Waldrip*, 380 S.W.3d at 132 (holding that trial court abuses its discretion when it acts without regard for guiding rules and principles).

An analysis of the harm caused by the lack of record or opportunity to address R.T.G.'s testimony during the conference with the trial court implicates Haden's contentions regarding the sufficiency of the evidence, which we turn to

next. *See id.* (reversal for abuse of discretion in admission or exclusion of evidence is appropriate only if error was harmful and probably led to an improper judgment).

B. Sufficiency of the Evidence to Support the Trial Court's Findings

In his fourth issue, Haden argues that the trial court should have denied the application for protective order because the evidence supporting its findings that Haden committed family violence and that family violence was likely to occur again in the future was legally and factually insufficient.

1. Standard of Review

We review the sufficiency of findings supporting a protective order under the same standard used in evaluating the sufficiency of evidence following a jury verdict. *See Lei Yang v. Yuzhuo Cao*, 629 S.W.3d 666, 670 (Tex. App.—Houston [1st Dist.] 2021, no pet.). Likewise, when the trial court acts as a factfinder, we review its findings under the legal and factual sufficiency standards. *Id.* (citing *Boyd v. Palmore*, 425 S.W.3d 425, 429 (Tex. App.—Houston [1st Dist.] 2011, no pet.), and *In re Doe*, 19 S.W.3d 249, 253 (Tex. 2000)). When, as here, a party who does not have the burden of proof at trial challenges the legal sufficiency of the evidence, we consider all the evidence in the light most favorable to the prevailing party, indulging every reasonable inference in that party's favor and disregarding

contrary evidence unless a reasonable factfinder could not. *Id.*; *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

We may not sustain a legal sufficiency, or "no evidence," point unless the record demonstrates: (1) a complete absence of evidence of a vital fact; (2) that the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) that the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) that the evidence conclusively establishes the opposite of the vital fact. *City of Keller*, 168 S.W.3d at 810. If more than a mere scintilla of evidence exists, it is legally sufficient, and we will overrule that issue. *Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386, 388 (Tex. 2005); *Lei Yang*, 629 S.W.3d at 670. There is more than a scintilla of evidence if the evidence rises to a level that would enable reasonable and fair-minded people to reach differing conclusions. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004); *Lei Yang*, 629 S.W.3d at 670.

In a factual sufficiency review, we consider and weigh all of the evidence. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Four J's Cmty. Living Ctr., Inc. v. Wagner*, 630 S.W.3d 502, 516 (Tex. App.—Houston [1st Dist.] 2021, pet. denied). When an appellant challenges an adverse finding on an issue on which it did not have the burden of proof at trial, we set aside the verdict only if the evidence supporting the finding is so weak as to make the verdict clearly wrong

and manifestly unjust. *Wagner*, 630 S.W.3d at 516 (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986)).

2. Relevant Law

The trial court rendered a final protective order pursuant to Family Code chapter 85,[2] which provides, in relevant part:

> (a) At the close of a hearing on an application for a protective order, the court shall find whether:
>
> > (1) family violence has occurred; and
> >
> > (2) family violence is likely to occur in the future.
>
> (b) If the court finds that family violence has occurred and that family violence is likely to occur in the future, the court:
>
> > (1) shall render a protective order as provided by Section 85.022 applying only to a person found to have committed family violence; and
> >
> > (2) may render a protective order as provided by Section 85.021 applying to both parties that is in the best interest of the person protected by the order or member of the family or household of the person protected by the order.

TEX. FAM. CODE § 85.001. In relevant part, "family violence" is defined as:

> [A]n act by a member of a family . . . against another member of the family . . . that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the

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2 We observe that, while the trial court's order did not expressly provide the statutory basis for its order, the language of its findings track Family Code chapter 85 and the parties briefed the case pursuant to Family Code chapter 85 rather than citing the provisions governing protective orders found in Texas Code of Criminal Procedure article 7B. Accordingly, we analyze the protective order based on the provisions in the Family Code.

> member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.

TEX. FAM. CODE § 71.004(1); *see Rodriguez v. Doe*, 614 S.W.3d 380, 385 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

3. Evidence supporting the trial court's findings

Haden argues that the evidence supporting the trial court's finding that he committed family violence was almost entirely based on inadmissible evidence. He complains that the evidence before the trial court included Tracey Gabel-Koehne's testimony and records from DFPS's investigation into R.T.G.'s allegations against Haden, which contained impermissible hearsay relating R.T.G.'s statements.

Haden's counsel objected to the admission of the DFPS case files setting out the details of R.T.G.'s allegations against him and the subsequent investigation concluding that there was "reason to believe" R.T.G.'s allegations. He argued that the DFPS files contained hearsay statements that were not redacted. The trial court responded, "The Court will be able to ascertain the hearsay that's contained within it, so I'm gonna go ahead and admit Applicant's 1, 2 and 3 and will do that over objection and will take into consideration the hearsay nature that's contained within the records." Opposing counsel argued, however, that "any hearsay within [the documents] falls under an exception. So if the Court's gonna not consider something, please let me know[.]"

The trial court responded:

[Court]: I will. Yeah. Well if you get to that point, then—and it draws an objection, then you can go from there. But under—because they are outcry records and because there is an exception in the code before, just like for child abuse, then the Court will definitely, you know, allow hearsay information to come in based on the outcry. But will certainly consider any objections that are made by the respondent's counsel.

[Haden]: For clarification purposes, Your Honor, on that objection, are we referring to the under rule—or under 12 rule or a different rule within the code? Because no outcry was made under the age of 12 and so that rule would not be applicable.

[Court]: No. There's a specific rule under the Family Code, under Chapter 85 that deals with that, so that's what I'm referring to. . . .

Haden's counsel again objected to Gabel-Koehne's testimony regarding what R.T.G. told her about what happened between herself and Haden:

[Gabel-Koehne]: And what did [R.T.G.] tell you?

[Haden]: I'm gonna object at this point, Your Honor and just re-urge under [section] 84.006, the child has to be twelve for it to not be hearsay, or at least excluded. And so this statement was made at least when she was 13 and so I think we have an issue to her statements in this case. She either should be here present as a part or the statement is hearsay.

[Court]: I'm gonna overrule it. She can answer.

Haden cites Family Code sections 84.006 and 104.006 for the proposition that hearsay statements of child victims of family violence are only admissible when the child victim is 12 years of age or younger. *See* TEX. FAM. CODE §§ 84.006, 104.006.

Section 84.006 provides:

> In a hearing on an application for a protective order, a statement made by a child 12 years of age or younger that describes alleged family violence against the child is admissible as evidence in the same manner that a child's statement regarding alleged abuse against the child is admissible under Section 104.006 in a suit affecting the parent-child relationship.

TEX. FAM. CODE § 84.006. Section 104.006 provides:

> In a suit affecting the parent-child relationship, a statement made by a child 12 years of age or younger that describes alleged abuse against the child, without regard to whether the statement is otherwise inadmissible as hearsay, is admissible as evidence if, in a hearing conducted outside the presence of the jury, the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability and:
>
>> (1) the child testifies or is available to testify at the proceeding in court or in any other manner provided for by law; or
>>
>> (2) the court determines that the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child.

Id. § 104.006.

Haden objected to the admission of R.T.G.'s hearsay statements contained in DFPS records and in Gabel-Koehne's testimony. Family Code section 84.006

applies only to statements by children 12 years of age or younger, and R.T.G. was 13 at the time she made the statements. *See id.* § 84.006. Thus, we agree with Haden that the trial court improperly relied on this provision to determine that hearsay statements recounting R.T.G.'s outcry statements were admissible.

Even without the hearsay statements contained in the DFPS records and in Gabel-Koehne's testimony, the record nevertheless contains brief descriptions of R.T.G.'s allegations against Haden and the facts that DFPS determined there was "reason to believe" her allegations against Haden, but the Harris County District Attorney declined to charge Haden with any crime. This evidence constitutes a scintilla of evidence that Haden sexually assaulted R.T.G., and, thus, committed family violence as set out in the Family Code. *See id.* § 85.001; *see also id.* § 71.004(1) (defining family violence as including act by family member that constitutes sexual assault). Accordingly, we conclude that the evidence is legally sufficient. *See City of Keller*, 168 S.W.3d at 810; *Lei Yang*, 629 S.W.3d at 670.

However, when we consider all the evidence—including the objected-to hearsay statement in the DFPS records and in Gabel-Koehne's testimony—we conclude that the evidence supporting the trial court's finding that family violence occurred is so weak as to make the trial court's determination manifestly unjust. *See Wagner*, 630 S.W.3d at 670. Despite statements by the trial court and the testimony of witnesses alluding to its existence, the video of R.T.G.'s forensic

interview at the CAC was not included in the record. The trial court interviewed R.T.G., but that interview is not included in the record and, as discussed above, Haden was not permitted to review or respond to any statements R.T.G. made to the trial court. The trial court also heard brief hearsay statements regarding Haden's conduct toward R.T.G. and DFPS's conclusion, based almost exclusively on R.T.G.'s statements to investigators, that there was reason to believe her allegations. This evidence does not rise to the level of factually sufficient evidence that family violence occurred and is likely to occur in the future. *See id.*

Accordingly, we conclude that the evidence was factually insufficient to support the trial court's order. We sustain Haden's fourth issue and part of his second issue on this ground.

Remaining Issues

In his first issue, Haden argues that the trial court's failure to file findings of fact and conclusions of law was harmful error. In a case tried without a jury, any party may request, within 20 days after the judgment is signed, that the trial court prepare findings of fact and conclusions of law. TEX. R. CIV. P. 296. The trial court signed the final protective order on February 25, 2020, and so the request for findings of fact and conclusions of law was due on March 16, 2020.[3] Haden did not file his request until March 17, 2020, one day late. This is untimely. *See id.* (stating

[3] We note that 2020 was a leap year and, thus, February 2020 had 29 days.

that party must file its request for findings of fact and conclusions of law within 20 days after judgment is signed); *Williams v. Kaufman*, 275 S.W.3d 637, 642 (Tex. App.—Beaumont 2009, no pet.) (holding that trial court is not required to comply with untimely request for findings of fact and conclusions of law); *Key Energy Servs., LLC v. Shelby Cnty. Appraisal Dist.*, 428 S.W.3d 133, 150 (Tex. App.—Tyler 2014, pet. denied) (holding that request for findings and conclusions was not timely when filed one day late and notice of past due findings and conclusions was filed four days late and, thus, trial court was not required to file findings of fact and conclusions of law). We overrule this complaint.

In his third issue, Gabel argues that the trial court's appointment of an amicus attorney was an abuse of discretion. Gabel-Koehne, however, argues that Gabel did not preserve this issue for appellate review, and we agree. As stated above, to present a complaint for appellate review, the record must show that (1) the complaint was presented to the trial court by a timely request, objection, or motion stating the specific grounds for the desired ruling if the specific grounds are not apparent from the context and (2) the trial court ruled on the request. TEX. R. APP. P. 33.1(a); *Guillory*, 442 S.W.3d at 689.

Here, the trial court announced its intent to appoint an amicus attorney at a hearing on October 11, 2019, because "there is a CAC forensic interview and Child Protective Services has been involved with this case," the trial court "wanted

someone on board who's familiar with these processes." Neither Haden Gabel nor any other party opposed or objected to the trial court's intention to appoint an amicus attorney, and the trial court signed the order appointing Thao Tran as the amicus attorney that same day. Tran filed an answer, met with R.T.G., the attorneys and other parties, and made an independent review of the background and circumstances leading to the filing of the protective order. Tran also appeared at and participated in the protective order hearing, again without objection. Haden first complained of the amicus attorney's appointment in his motion for new trial filed on March 5, 2020, weeks after the trial court rendered its final protective order.

Because Haden did not raise his objection until after the final hearing had occurred and the amicus attorney had already completed her work on the case, the objection was not timely—"[i]t was not made at the earliest possible opportunity or at a time that would have allowed the trial court an opportunity to cure the error." *Guillory*, 442 S.W.3d at 689–90; *see Bush v. Bush*, 336 S.W.3d 722, 729 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (holding that objection to scope of amicus attorney's appointment made in motion for new trial failed to preserve complaint for appeal).

We overrule Haden's third issue.

In part of his fourth issue and in his fifth issue, Haden identifies other errors in the trial court's order, including challenging the trial court's finding that family violence was likely to occur in the future, challenging the duration of the protective order, and challenging the order's impact on Gerard Gabel's parental rights regarding R.T.G. In his sixth issue, Haden asserts that the trial court erred in awarding opposing counsel's attorney's fees and amicus attorney's fees against his mother Catherine Gabel.[4] We have already reversed the entirety of the order on the grounds set out above, and these issues will not afford him any greater relief. *See CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 99 (Tex. 2000).

Conclusion

Because we conclude that the trial court's finding that Haden committed an act constituting family violence was not supported by factually sufficient evidence, we reverse the trial court's order and remand for further proceedings consistent with this opinion.

Richard Hightower
Justice

Panel consists of Justices Kelly, Hightower, and Farris.

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[4] We note that Catherine Gabel was not a party to the suit below. The final protective order identified Catherine as Haden's mother, but it does not provide a basis for holding her liable for attorney's fees in this case. She was not identified as a party in the application for protective order, and the record does not contain any pleadings seeking attorney's fees from her.