COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00428-CV

IN THE INTEREST OF J.M., A
CHILD

FROM THE 360TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 360-576642-15

MEMORANDUM OPINION[1]

Appellee K.D. (Mother)[2] voluntarily placed her son J.M. (John) with Appellant L.B. (Lynn) while the Department of Family and Protective Services (DFPS) investigated Mother. After Lynn cared for John for about nine months,

[1]*See* Tex. R. App. P. 47.4.

[2]To protect the parties' identities, we identify them using initials and fictitious names. *See* Tex. Fam. Code Ann. § 109.002(d) (West 2014); Tex. R. App. P. 9.9(a)(3) (classifying a minor child's name as sensitive data).

she filed an original suit affecting the parent-child relationship seeking sole managing conservatorship of John. After a bench trial, the trial court appointed Mother and John's father, Appellee J.M. (Father), as John's joint managing conservators. In two issues, Lynn challenges the trial court's order, complaining that the trial court abused its discretion by appointing Mother and Father as joint managing conservators and by not appointing her as sole managing conservator. We reverse and remand.

Background

In April 2014, Lynn met Mother and her two children, A.F. (Ava) and John, through Lynn's job as a teacher at a Head Start program Ava and John attended. In August 2014, when John was 18 months old, Mother voluntarily placed the children with Lynn when DFPS began investigating Mother for child abuse. Ava eventually went to live with her father.

In May 2015, Lynn filed suit seeking sole managing conservatorship of John. *See* Tex. Fam. Code Ann. § 102.003(a)(9) (West Supp. 2016) (conferring standing on "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition"). Mother, through her counsel, filed a general denial in early July 2015. Later that month, the trial court entered agreed temporary orders appointing Lynn as John's temporary sole managing conservator and ordering that Mother and Father have supervised

access to John.[3] DFPS closed its case in October 2015 but did not notify the parties. Father, acting pro se, filed a counterpetition in May 2016, requesting that he be named John's sole managing conservator, that Mother have supervised access to John, and that Lynn have no access to or possession of John.

The case was tried to the bench on June 30, 2016. At that time, John was three years old and had lived with Lynn for nearly two years. The trial court heard testimony from Lynn, Mother, Father, one of Lynn's coworkers at the Head Start program, and two of Mother's sisters. In addition to hearing testimony about John's life since August 2014, Lynn's fitness to be John's conservator, and Mother's and Father's lives both before and after the children's removal, the court heard that Mother had physically abused the children and that Father had physically abused Mother and John.

Lynn testified that at different times before and after the children's removal from Mother,[4] Ava showed up at school with burns on her legs, a cut over her eye, a black eye, and a "busted lip." In July 2015, Mother pleaded guilty to two counts of bodily injury to a child (Ava) for two incidents, one in August 2014—which precipitated DFPS's investigation and Mother's voluntarily placing the children with Lynn—and the other in November 2014. *See* Tex. Penal Code Ann. § 22.04(f) (West Supp. 2016). The trial court in that proceeding placed Mother on

[3]Even though Father did not file any pleadings until nearly a year later, he appeared at the hearing on Lynn's application for temporary orders.

[4]Mother had access to the children even after their removal.

deferred-adjudication community supervision for three years for each offense. Her plea-bargain and community-supervision terms prohibited her from having unsupervised visitation with the children. According to Mother, in one of the cases (she did not specify which one), Ava was in the possession of Mother's sister E.D. (Emma) when the injury occurred. Mother did not deny the other incident.

Emma[5] testified that she had witnessed Mother backhand Ava across the mouth and hit John on his chest but admitted that she had never witnessed Father hurting the children. Emma also testified that John had a burn on his face. Lynn testified as well that while John was in Father's possession, he suffered a third-degree burn on his face that required medical treatment at a hospital.

Father admitted to hitting and choking Mother on December 31, 2014, but he and Mother both insisted that it was the only time he had physically assaulted her. Father was charged with two counts of assault causing bodily injury. *See id.* § 22.01(a)(1), (b)(2)(B) (West Supp. 2016). He pleaded guilty to and was convicted of one count of misdemeanor assault and was sentenced to 30 days in jail. *See id.* § 22.01(a)(1), (b). Lynn's coworker at the Head Start program testified that before the children's removal, Mother showed up at the children's school with a "busted lip" on one occasion and a black eye on another. Mother told Lynn and her coworker that Father had hit her. Although Father denied it,

[5]Emma had custody of the children during an earlier DFPS investigation that occurred sometime before the children were placed with Lynn.

Mother's sister Emma also testified that she saw Father hit and choke Mother in the fall of 2014 in front of the children. Mother's sister V.D. (Vera) testified that during the summer of 2014, she lived in the same apartment complex as Mother. Vera never saw Mother with black eye or "busted lip" and never witnessed Father assaulting or fighting with Mother. Vera also said that she never saw Mother hit John.

At the trial's conclusion, the trial court affirmatively stated on the record that there was a history of family violence. But because the trial judge was a "big believer that parents should raise children," he appointed Father and Mother as joint managing conservators and removed Lynn as temporary sole managing conservator. The trial court gave Father the exclusive right to designate John's primary residence and ordered that Mother pay child support to Father and have supervised access to John on the first, third, and fifth weekends of every month.

Lynn timely requested findings of fact and conclusion of law and later timely filed a notice of past-due findings and conclusions. *See* Tex. R. Civ. P. 296, 297. The trial court did not, though, file any findings and conclusions.

Standard of Review

Where, as here, no findings of fact or conclusions of law are filed, the trial court's judgment implies all factual findings necessary to support it. *Rosemond v. Al-Lahiq*, 331 S.W.3d 764, 766–67 (Tex. 2011); *Wood v. Tex. Dep't of Pub. Safety*, 331 S.W.3d 78, 79 (Tex. App.—Fort Worth 2010, no pet.). Where a reporter's record is filed, however, these implied findings are not conclusive, and

an appellant may challenge them by raising both the legal and factual sufficiency of the evidence. *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003); *Liberty Mut. Ins. Co. v. Burk*, 295 S.W.3d 771, 777 (Tex. App.—Fort Worth 2009, no pet.). If such evidentiary issues are raised, we apply the same standard of review as in the review of jury findings or a trial court's findings of fact. *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989); *Liberty Mut. Ins. Co.*, 295 S.W.3d at 777. We must affirm if the judgment can be upheld on any legal theory that finds support in the record. *Rosemond*, 331 S.W.3d at 767; *see also Liberty Mut. Ins. Co.*, 295 S.W.3d at 777 (stating that the judgment must be affirmed if it can be upheld on any legal theory that finds support in the evidence).

We review a trial court's decisions regarding the conservatorship of a child under an abuse-of-discretion standard. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007); *In re M.L.*, No. 02-15-00258-CV, 2016 WL 3655190, at *3 (Tex. App.—Fort Worth July 7, 2016, no pet.) (mem. op.). A trial court abuses its discretion if it acts arbitrarily and unreasonably or without reference to guiding principles. *Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011); *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). A trial court also abuses its discretion if it does not analyze or apply the law properly. *Iliff*, 339 S.W.3d at 78.

In an abuse-of-discretion review, legal and factual sufficiency are not independent grounds of error, but they are relevant factors in deciding whether the trial court abused its discretion in a conservatorship case. *See M.L.*,

2016 WL 3655190, at *3. Thus, in applying the abuse-of-discretion standard, we use a two-pronged analysis: whether the trial court had sufficient evidence upon which to exercise its discretion and whether the trial court erred in applying its discretion. *Id.*; *see Wise Elec. Coop., Inc. v. Am. Hat Co.*, 476 S.W.3d 671, 679–80 (Tex. App.—Fort Worth 2015, no pet.) (setting forth standards for legal and factual sufficiency).

Issues on Appeal and Applicable Law

Lynn raises two issues.[6] First, she asserts that the evidence of a history of family violence and physical abuse in this case rebutted family-code section 153.131's parental presumption, precluded the appointment of Mother and Father as joint managing conservators, and created a presumption that it was not in John's best interest for either parent to be appointed as a managing conservator. *See* Tex. Fam. Code Ann. §§ 153.004(b), 153.131 (West 2014). Second, she contends that the trial court abused its discretion by not appointing her as sole managing conservator.

The child's best interest is always a trial court's primary consideration in determining conservatorship issues. *Id.* § 153.002 (West 2014). The family code presumes that appointment of both parents as joint managing conservators or a parent as sole managing conservator is in a child's best interest, and it imposes a

[6]Neither Mother nor Father filed a brief.

heavy burden on a nonparent to rebut that presumption. *See id.* § 153.131;[7] *see also In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000) (explaining that natural parent "has the benefit of the parental presumption . . . and the nonparent seeking conservatorship has a higher burden"); *Whitworth v. Whitworth*, 222 S.W.3d 616, 623 (Tex. App—Houston [1st Dist.] 2007, no pet.) (op. on reh'g) ("There is a strong presumption that the best interest of a child is served if a natural parent is appointed as managing conservator."). For a court to award managing conservatorship to a nonparent, the nonparent must prove—and the trial court must find—that appointing a parent as sole managing conservator or the parents

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[7]Section 153.131 provides:

> (a) Subject to the prohibition in Section 153.004, 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.

Tex. Fam. Code Ann. § 153.131. "Family violence" includes "an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, [or] assault," and "abuse, as that term is defined by Sections 261.001(1)(C), (E), (G), (H), (I), (J), and (K), by a member of a family or household toward a child of the family or household." *Id.* § 71.004(1), (2) (West Supp. 2016), § 101.0125 (West 2014), § 261.001 (West Supp. 2016).

as joint managing conservators would not be in the child's best interest because the appointment would "significantly impair the child's physical health or emotional development." Tex. Fam. Code Ann. § 153.131(a); *see In re C.M.C.*, No. 02-10-00260-CV, 2011 WL 1532395, at *5 (Tex. App.—Fort Worth Apr. 21, 2011, no pet.) (mem. op.); *Whitworth*, 222 S.W.3d at 623.

When a trial court determines whether to appoint a party as a child's sole or joint managing conservator, by law the trial court must consider evidence of the intentional use of abusive physical force by a party directed against the child's parent or any person younger than 18 committed within the two years before suit was filed or during the suit's pendency. Tex. Fam. Code Ann. § 153.004(a). When there has been a history or pattern of physical abuse by one parent against the other parent or by one parent against a child, the code expressly prohibits a trial court from appointing joint managing conservators and creates a rebuttable presumption that it is not in the child's best interest for an abusive parent to be appointed sole managing conservator:

> The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child, including a sexual assault in violation of Section 22.011 or 22.021, Penal Code, that results in the other parent becoming pregnant with the child. . . . It is a rebuttable presumption that the appointment of a parent as the sole managing conservator of a child or as the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child.

Id. § 153.004(b). Moreover, evidence of child abuse is not limited to the particular child involved in the suit; evidence that a parent has abused any child is relevant. *In re K.S.*, 492 S.W.3d 419, 427 n.12 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see* Tex. Fam. Code Ann. § 153.004(b).

The family code does not define "history," but a single act of violence or abuse suffices to show a history of physical abuse. *See Baker v. Baker*, 469 S.W.3d 269, 274 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Dewalt v. Dewalt*, No. 14-06-00938-CV, 2008 WL 1747481, at *4 (Tex. App.—Houston [14th Dist.] Apr. 17, 2008, no pet.) (mem. op.)); *In re R.T.H.*, 175 S.W.3d 519, 521 (Tex. App.—Fort Worth 2005, no pet.) (citing *In re Marriage of Stein*, 153 S.W.3d 485, 489 (Tex. App.—Amarillo 2004, no pet.)); *cf.* Tex. Fam. Code Ann. § 153.004(b) (providing that "[a] *history* of sexual abuse includes *a* sexual assault that results in the other parent becoming pregnant with the child" (emphasis added)).

"Credible evidence" is also undefined, as is "physical abuse" as that term is used in section 153.004. *Cf.* Tex. Fam. Code Ann. § 261.001(1) (defining "abuse" as used in family code chapter 261); § 261.410(a)(1) (West 2014) (defining "physical abuse" as used in that section). We thus construe these terms according to common usage. *See* Tex. Gov't Code Ann. § 311.011(a) (West 2013). "Credible evidence," then, is "[e]vidence that is worthy of belief; trustworthy evidence." Black's Law Dictionary 674 (10th ed. 2014). "Physical" means "of or relating to the body." Webster's Third New International Dictionary

1706 (2002). "Abuse" means "physically harmful treatment." *Id.* at 8. Defined another way, "abuse" means "[c]ruel or violent treatment of someone, specif., physical . . . maltreatment, often resulting in . . . physical injury." Black's Law Dictionary at 12.

Analysis

As part of her first issue, Lynn contends that section 153.004(b) precluded Mother and Father from being joint managing conservators because there was credible evidence of physical abuse.

While Mother and Father each disputed some of the physical-abuse allegations, they both conceded that Father hit and choked Mother on December 31, 2014, and it was undisputed that Mother caused bodily injury to Ava in either August or November 2014; also undisputed was Lynn's and Emma's testimony regarding Mother's physically abusing Ava. Because these acts of physical abuse were either conceded by the parties or shown by uncontradicted testimony—and because the trial court stated on the record that there was a history of family violence[8]—there was credible evidence of a history of physical

[8]We recognize that a trial court's oral statements do not constitute findings of fact or conclusions of law. *See, e.g.*, *In re Doe*, 78 S.W.3d 338, 340 n.2 (Tex. 2002); *Seneca Ins. Co. v. Ross*, 507 S.W.3d 798, 803 (Tex. App.—El Paso 2015, no pet.). But in light of the trial court's oral finding regarding a history of family violence and the undisputed testimony regarding Father's physically abusing Mother and Mother's physically abusing Ava, it is not reasonable for us to conclude that the trial court chose to disbelieve this evidence. *See One Ford Mustang, VIN1FAFP40471F207859 v. State*, 231 S.W.3d 445, 454 (Tex. App.—Waco 2007, no pet.) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005)).

abuse by one parent against the other and by one parent against a child. *See Stein*, 153 S.W.3d at 489 (citing *Tex. & N.O.R. Co. v. Burden*, 203 S.W.2d 522, 530 (Tex. 1947) (stating that where evidence exists on an issue without any contrary evidence, the factfinder may not disregard the undisputed evidence and decide the issue in accordance with its wishes)). Because the family code prohibits a trial court from appointing joint managing conservators when a history exists of physical abuse by one parent against the other parent or by one parent against a child, the trial court here abused its discretion by designating Mother and Father as John's joint managing conservators. *See id.*; *see also Baker*, 469 S.W.3d at 275.

We thus sustain this part of Lynn's first issue, which is dispositive, and we do not reach the remaining parts of her first issue or her second issue. *See* Tex. R. App. P. 47.1. Family-code section 153.004(b) prohibited the trial court from appointing Mother and Father as joint managing conservators, but it did not render either of them ineligible to be named sole managing conservator. *See* Tex. Fam. Code Ann. § 153.004(b); *see also Baker*, 469 S.W.3d at 276 (stating that father was not rendered ineligible to be named sole managing conservator even though mother proved that he had a history of being physically abusive against her). And while we agree with Lynn that section 153.004(b) creates a presumption that it is not in a child's best interest for a parent with a history of physical abuse to be appointed sole managing conservator, that presumption is rebuttable. And even with that presumption, for Lynn to be named sole managing

conservator the trial court would have to find that appointing either Mother or Father as sole managing conservator would not be in John's best interest and that Lynn's appointment as conservator would be. *See* Tex. Fam. Code Ann. §§ 153.002, 153.004(b), 153.131(a). The best-interest determination is a question for the factfinder. *Van Heerden v. Van Heerden*, 321 S.W.3d 869, 875 (Tex. App.—Houston [14th Dist.] 2010, no pet.). As an appellate court, we cannot make original fact findings; we can only "unfind" facts. *Tex. Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986); *AMX Enters., L.L.P. v. Master Realty Corp.*, 283 S.W.3d 506, 519 (Tex. App.—Fort Worth 2009, no pet.) (op. on reh'g). Accordingly, we must remand this case for a new trial on conservatorship, access and possession, and child support. *See Baker*, 469 S.W.3d at 275–76; *Van Heerden*, 321 S.W.3d at 874–75; *Stein*, 153 S.W.3d at 489–90.

Conclusion

Having sustained the dispositive portion of Lynn's first issue, we reverse the trial court's order and remand this case for a new trial on conservatorship, access and possession, and child support. *See* Tex. R. App. P. 43.2(d), 43.3.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: GABRIEL, KERR, and PITTMAN, JJ.

DELIVERED: August 31, 2017