Opinion issued June 18, 2020.

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00058-CV

IN THE INTEREST OF R.S., R.S., AND R.S., CHILDREN

On Appeal from the 425th Judicial District Court
Williamson County, Texas
Trial Court Case No. 16-1394-F425

MEMORANDUM OPINION[1]

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[1] Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal from the Court of Appeals for the Third District of Texas to this Court. *See* Misc. Docket No. 18-9049 (Tex. Mar. 27, 2018); *see also* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases). We are unaware of any conflict between the precedent of the Court of Appeals for the Third District and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

K.M.W. (Mother) is appealing a final order appointing N.J.S. (Father) as the sole managing conservator of their children.[2] In a single issue, Mother argues that the trial court abused its discretion when it did not appoint her as a joint managing conservator or possessory conservator and when it denied her all possession of and access to the children. We affirm the trial court's final order.

Background

Mother and Father have three children, ten-year old Annie, six-year old Brandon, and three-year old Claire.[3] After thirteen years together, the couple separated in February 2016 and Father moved in with his girlfriend.

On April 27, 2016, Father filed an Original Petition in Suit Affecting the Parent-Child Relationship (SAPCR). Mother filed an Original Petition of Divorce on April 29, 2016 in a separate cause number.[4]

The trial court entered agreed temporary orders on May 5, 2016 in the SAPCR case which appointed Sandra Aguilar as the children's guardian ad litem.

On May 17, 2016, Father filed a motion for issuance of writ of attachment and further temporary orders in which he alleged that Mother had taken the children to California without his knowledge and denied him any access to them. He asked the

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2 In order to protect the children's privacy, we will refer to the children, their parents, and family members using pseudonyms.

3 These are the children's ages as of the time of trial in July 2017.

4 Mother's petition for divorce was subsequently dismissed for want of prosecution.

court to award him temporary possession of the children and temporary exclusive use of the family home, and to grant Mother supervised visitation. The motion was set for a hearing on May 20, 2016.

Mother left the children with friends and relatives in California and returned to Texas on May 18, 2016 for the hearing on Father's motion.

On May 19, 2016, Mother went to Father's office and asked to speak with him outside. She sat in her vehicle with the door open and told Father they needed to talk. Father reminded Mother that they had a hearing scheduled for the next day, at which point Mother informed him that she was not going to the hearing because she did not have a lawyer anymore. Father testified that he turned away from Mother for a second or two and, when he looked back, Mother was pointing a gun at his chest. He immediately started running and Mother shot him in the leg. Father hid nearby and watched as Mother drove slowly around the parking lot, as if she was trying to find him and "finish him off."

During the May 20, 2016 hearing on Father's motion, Father testified that eyewitnesses reported that Mother tried to shoot at him several other times, but the gun jammed after the first shot. Mother then broke into Father's girlfriend's house where Father had been living and waited for Father to return. Father's girlfriend, however, came home first and found Mother in the living room. According to the girlfriend, Mother told her repeatedly that she was there to kill Father or to kill

herself, if she was not able to kill Father. The girlfriend ran out of the house and called the police after Mother went to the bathroom to kill herself. Police surrounded the home and "they pushed [Mother] out into the garage where she had a gun barrel in her mouth." According to Father, Mother kept saying that if she could not kill him, she would kill herself. The police were able to take Mother into custody using non-lethal force.

At the conclusion of the hearing, the trial court issued temporary orders awarding Father possession of the children and suspending Mother's right of possession. The court also awarded Father possession of the family home while the case was pending. By its terms, the order would expire upon the signing of a final order in the SAPCR. The trial court also issued a writ of attachment authorizing Father to take immediate possession of the children who were staying with Mother's friends and relatives in California. Before Father was able to take possession of the children, however, Mother's family reported to local authorities that the children had made outcries of abuse against Father and filed a petition for guardianship of the children. After extensive legal proceedings, the children were eventually returned to Father's care in Texas.

Mother, who had been arrested for shooting Father, was released from jail in late August 2016 because the jury did not indict her. Father then filed an application for a protective order and, on September 7, 2016, the trial court issued a protective

order finding that Father was a victim of family violence and that Mother committed the family violence.

The case was tried to the bench in July 2017.

Father testified that Mother would hit him and kick him when she was "really angry" and she had also been violent in front of their children. He described one instance in March 2016 that the children witnessed. Father, who moved out in February 2016, went to the family home in early March 2016 to spend time with the children. Mother, who was holding Claire in her arms, kicked Father and knocked him over while he was standing next to Brandon because Father rejected her sexual advances. Mother then put Claire on the floor and started punching and kicking Father while the children watched. According to Father, Mother then grabbed two large knives from the kitchen and ran and locked the front door. Father testified that Mother's behavior scared him, so he ran out the back door. Mother then locked the back door and closed the blinds. At that point, Father called the police.

Father returned to the home on March 12, 2016 to spend time with the children. According to Father, Mother was drinking heavily that evening and they argued about the separation. After putting the children to sleep, Father saw Mother walk out of the master bedroom holding a ten-inch serrated knife to her throat. Father persuaded Mother to follow him downstairs and away from the children's bedrooms. Mother, who was still holding the knife to her throat, told Father, "I don't need to

live. I – I want to be gone. I want to be gone. Why don't you love me? I've tried everything. I've done everything I can." Father testified that he took out his phone and recorded their conversation. When he told her that he was going to call an ambulance to help her, Mother told him, "If you call an ambulance, I'm going to kill you and kill myself." Father managed to calm Mother down and he took the knife away. After Mother passed out, Father carried her upstairs to her bedroom and then he left the house. When he came back by the house early the next morning to check on the kids, Mother told him that she had called the police and CPS because she noticed that Father was not there.

Father also testified that he did not want the court to grant Mother access to the children because he feared for their safety and he was concerned that any such interaction could jeopardize the progress the children had made in therapy. According to Father, Annie had been diagnosed with "PTSD from the [incident] in California and . . . from her knowledge of the situation of the shooting and stuff." Brandon had also been diagnosed with PTSD. Father testified that the children mention Mother, but they have not asked to see her.

Jackie Robbins, an investigator with Child Protective Services (CPS), testified that the department received a report in March 2016 that Father had left the children at home alone. Mother told Robbins that she left the house around 8:30 p.m. that evening and that Father, who was supposed to be watching the children, was not at

home when she returned early the next morning. Father, however, told Robbins that Mother was heavily intoxicated that evening and that they had a heated discussion regarding their separation. Father also played an audio recording of a conversation he allegedly had with Mother that night while she was under the influence. When Robbins discussed these issues with Mother, including the audio recording, Mother told Robbins that she had been home the entire evening. After conducting its investigation, CPS ruled out any claims of abuse or neglectful supervision.

She also testified that CPS became involved with the family again after Mother's family reported possible sexual abuse, medical neglect, and neglectful supervision by Father. Robbins testified that the children did not make any outcries of abuse to her when she had previously interviewed them about the March 2016 event and that all the new allegations "were ruled out entirely."

Aguilar, the children's guardian ad litem, recommended that Father be appointed as the children's sole managing conservator and that Mother have no possession of or access to the children until she received intensive psychological treatment. Aguilar opined that although "children need healthy relationships with their parents," Annie, Brandon, and Claire were not ready to see Mother. According to Aguilar, the children were angry and grieving over what had happened to their family, and any future movement towards visitation with Mother needed to be very controlled initially. She opined that the children's therapists should be involved in

making a recommendation about when to begin visitation. Aguilar also testified that she was concerned that Mother might pose a threat to the children because Mother had recently been in "a position where she lost control, that if we don't have good documentation and good information about that, that that could happen again when she's caring for the children."

Aguilar also expressed concerns about Mother's family based on her conversations with Annie. After Mother's family was ordered to return the children to Father, the family allegedly told the children "[p]ut dad in the position to call the police. When the police show up, run towards the police and act like [you're] fearful. Go hide under a table." According to Aguilar, Mother's family instructed the children "about how to react and to show fear." When asked if she would characterize this type of behavior as an attempt to alienate the children from Father, Aguilar testified that "hearing [Annie] try to tell the story and remember all the pieces and then talk about some of the medical issues that she had or that [Brandon] had, it almost sounds like brainwashing."

Mother acknowledged that she shot Father in May 2016 and that she looked for him after he ran away. She testified that the gun jammed after she fired the first shot. After she left the parking lot, Mother broke into Father's girlfriend's home where Father had been living, drank the girlfriend's wine, and passed out on her couch. Mother, who was highly intoxicated and did not remember the details of the

conversation, allegedly told Father's girlfriend that she came there because she "hadn't finished the job."

Mother, however, denied that she had intended to kill Father or herself the day of the shooting. According to Mother, she and Father were talking calmly in the parking lot when she pulled out her handgun and pointed it at him. Mother, who was not angry, testified that she just felt "so powerless, and this is a person that has historically taken huge advantage of me when I'm powerless." She "really felt like [she] was floating and had no purpose."

Mother also testified about the March 2016 event that led her to report Father to CPS for leaving the children at home unattended. According to Mother, Father picked up a new medication that she had been prescribed for her severe postpartum depression and he brought it with him when he came to the house to watch the kids on March 12, 2016. According to Mother, Father poured her at least two glasses of whiskey that evening and he did not tell her that she should not drink alcohol while taking the medication. Mother testified that she went downstairs to check on the children around 8:00 p.m. and the next thing she remembered was standing inside the front door of her home, fully clothed, and looking into the house. It was approximately 2 a.m. and Brandon ran to her and she could hear the baby, Claire, crying upstairs. Father was not in the house and he did not respond to the multiple text messages she sent him. Mother also testified that she went back to sleep and,

when she woke up around 5 a.m., Father told her that she had been very drunk the night before. He also told her that she "had knives and was suicidal and that he had made a recording of me, and that I had been so intoxicated that he had to carry me up to bed. And he said I was fighting him."

On April 18, 2016, Mother filed an application for a protective order in which she alleged several instances of harassment and physical and sexual abuse by Father, including the March 12–13, 2016 incident. Mother averred in her affidavit that she went to her room and blacked out after Father gave her a glass of whiskey during dinner. When she awoke at 2 a.m., she had multiple bruises and scrapes and Father, who was supposed to be watching the children, was gone. Mother averred that she believed that Father had "drugged" her. Mother's application for a protective order was non-suited on April 29, 2016. Mother testified that she only dropped the application for a protective order because she learned that Father had recorded one of their conversations and she was concerned about making a "bad first impression" on the court.

Mother also testified that she took the children to California in May 2016 because Father had stopped paying the utility bills. She testified that she believed that Father would not object to her taking the children to California because, before they separated, she and Father had discussed letting the children go to California for the summer.

When asked if she had received any mental health treatment, Mother testified that she went to Hope Alliance in Round Rock when she was trying to end her relationship with Father, she met with Margaret Bassett, the deputy director and the director of Expert Witness Programs at the University of Texas in the Institute on Domestic Violence & Sexual Assault in the school of social work, while she was in jail, and when she returned to California after her release from jail, she sought treatment through the YMCA and eventually saw psychologist, Mary Ann Rowe. When asked if she was still in therapy, Mother testified, "I have concluded my therapy with [Rowe], and I'm absolutely open to more therapy. If anyone suggests that is a good idea, that would be fine." Mother testified that she was no longer suffering from any form of depression and the only medication she was taking was for a thyroid condition. Mother testified that Rowe had done a full psychological evaluation of her but Rowe "had to send part of it away to the east coast to be analyzed, and we're waiting on that to come back."

Melanie, Mother's and Father's mutual friend, and Becky, the mother of one of Annie's friends, testified about Mother's parenting skills and her involvement in the children's afterschool activities. Melanie, who described Mother as a "loving and caring and wonderful" parent, also testified that Mother had multiple bruises on her arms in March 2016 and told her that Father had pushed her down the stairs when she was drinking.

Bassett testified for Mother at trial. Bassett had been previously retained by Mother's criminal defense attorney to provide a biopsychosocial history assessment and report. After interviewing Mother once, Bassett concluded that Mother had been in an abusive relationship with Father and that Mother did not intend to harm Father when she shot him, rather, "[h]er intent was to protect herself and her children." Bassett testified that she did not conduct a psychological examination of Mother, it was only a clinical interview, and she never spoke to Father about Mother's allegations of abuse.

Bassett's report, which was admitted into evidence, reflects that Mother told Bassett during the interview that she was not trying to kill Father. According to the report, Mother stated that she felt like she was "floating" and she "watched her hand fire the gun." Mother also reported that she drove to Father's girlfriend's home to "kill herself there but she couldn't do it." Mother told Bassett that she talked to Father's girlfriend a long time and told her that she was afraid of Father and she did not know what to do now that she had shot him. Mother "said at the time, the only conclusion she could come to was to kill herself. She said when she walked out of the house, she had the gun pointed at either her temple or under her chin and that she wanted to kill herself but couldn't do it and reports 'I hoped the police would shoot me.'"

In her report, Bassett concluded, "It is my assessment that [Mother] was in a dissociative state [when she shot Father], triggered by her fear for her children, her assessment that [Father] once again had control over her and most significantly flashing back on the years of abuse she had suffered." When asked if Mother had been suicidal, Bassett testified, "Somebody who feels like the world is better off without them is—has a deeper grasp on wanting to be dead than somebody who is situationally—doesn't know what to do and feels hopeless and feels helpless and feels like the only thing they can do is kill themselves in that moment."

On August 24, 2017, the trial court rendered a final order in the SAPCR proceeding in which it named Father as the children's sole managing conservator and found that the appointment of Mother as a joint managing conservator was not in the children's best interest and that Mother's possession or access would endanger the physical or emotional welfare of the children. The court also denied Mother "claim of marriage."

The court subsequently issued findings of fact and conclusions of law in which it found that there was "credible evidence of a history or pattern of past or present physical abuse by [Mother] directed against [Father], and it is not in the best interest of the children that [Mother] be appointed as a sole or joint managing conservator of the children." The court further found that it was in the children's best interest that Mother have no possession of the children because (1) Mother "took the children

to California without the permission of [Father] and did not return them to this jurisdiction until she was ordered to do so," (2) Mother shot Father on May 19, 2016 and "planned to commit suicide," (3) "Credible evidence of [Mother's] suicidal and homicidal tendencies was presented, and insufficient evidence was presented that [Mother] had received adequate mental health treatment to ensure the safety of the children," and (4) "The limitations on [Mother's] possession schedule are the minimum required to protect the best interest of the children." The court also found that it was not in the children's best interest to appoint Mother as the possessory conservator because possession or access would endanger the physical or emotional welfare of the children. The court also found that neither Mother nor her expert, Bassett, were credible.

Discussion

In her sole issue, Mother argues that the trial court abused its discretion by not appointing her as a joint managing conservator or a possessory conservator and, at a minimum, the court should have awarded her some possession of and access to the children and it abused its discretion by not doing so.

A. Standard of Review

Conservatorship determinations made after a bench trial are "subject to review only for abuse of discretion, and may be reversed only if the decision is arbitrary and unreasonable." *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007); *In re J.J.G.*, 540

S.W.3d 44, 55 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). Legal and factual sufficiency of the evidence are not independent grounds of error, but relevant factors in determining whether the trial court abused its discretion. *See In re J.J.G.*, 540 S.W.3d at 55. In determining whether the trial court abused its discretion, the appellate court applies a two-pronged test: (1) whether the evidence was legally and factually sufficient for the trial court to support a decision on conservatorship, i.e., sufficient information on which to exercise its discretion and (2) whether the trial court's decision was unreasonable, i.e., the court erred in its application of discretion. *See id*. A trial court does not abuse its discretion if it bases its decisions on conflicting evidence or so long as there is some evidence of substantive and probative character to support the trial court's decision. *Id*.

In conducting a legal sufficiency, or "no evidence," review, we consider the evidence in the light most favorable to the trial court's judgment, disregarding all evidence and inferences to the contrary unless reasonable jurors could not do so. *City of Keller v. Wilson*, 168 S.W.3d 802, 810–11 (Tex. 2005). Anything more than a scintilla of probative evidence is legally sufficient to support the trial court's finding. *See In re J.J.G.*, 540 S.W.3d at 61.

In determining whether the evidence was factually sufficient to support the trial court's judgment, we consider all the evidence and set aside the findings only if we find that they are so contrary to the overwhelming weight of the evidence as to

be clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re J.J.G.*, 540 S.W.3d at 62.

In a bench trial, the trial court, as the trier of fact, is the sole judge of the credibility of the witnesses, assigns the weight to be given their testimony, and may accept or reject all or any part of their testimony. *Jordan v. Dossey*, 325 S.W.3d 700, 713 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). Because of the fact-intensive nature of reviewing custody issues, an appellate court must afford great deference to the factfinder on issues of credibility and demeanor because "it faced the parties and their witnesses, observed their demeanor, and had the opportunity to evaluate the claims made by each parent." *In re J.J.G.*, 540 S.W.3d at 56 (quoting *In re J.R.D.*, 169 S.W.3d 740, 743 (Tex. App.—Austin 2005, pet. denied)); *see also Chavez v. Chavez*, 148 S.W.3d 449, 458 (Tex. App.—El Paso 2004, no pet.).

Further, when there is conflicting evidence presented at trial it is the province of the factfinder to resolve such conflicts. *Jordan*, 325 S.W.3d at 713. In every circumstance in which a reasonable trier of fact could resolve conflicting evidence either way, the reviewing court must presume that it did so in favor of the prevailing party. *Id*. It is not within the province of this court to interfere with the factfinder's resolution of conflicts in the evidence. *See In re J.J.G.*, 540 S.W.3d at 56.

B. Applicable Law

The Family Code provides extensive guidance for courts making determinations regarding conservatorship and possession of and access to a child. *See id.* at 55.

The court's paramount concern in any proceeding involving determinations of conservatorship or possession of or access to a child is whether the decision is in the child's best interest. *See* TEX. FAM. CODE § 153.002; *In re A.C.*, 394 S.W.3d 633, 644 (Tex. App.—Houston [1st Dist.] 2012, no pet.). Family Code section 153.131 creates a rebuttable presumption that the appointment of both parents as joint managing conservators is in a child's best interest. *See* TEX. FAM. CODE § 153.131(b). The parental presumption under Section 153.131, however, is removed when there is a "finding of a history of family violence involving the parents of a child." *Id.*; *see also In re J.J.G.*, 540 S.W.3d at 56. "Family violence" is defined as "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, assault, or sexual assault or that is a threat that reasonably places the 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 also id.* § 153.004(g)(2) ("'Family violence' has the meaning assigned by Section 71.004"). When making conservatorship determinations, courts are also required to

consider whether a parent "engaged in a history or pattern of family violence, as defined by Section 71.004 [or] a final protective order was rendered against" a parent "preceding the filing of the suit or during the pendency of the suit." *See id.* § 153.005(c)(1), (3).

Section 153.131(a) further provides,

> 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.

Id. § 153.131(a). Thus, section 153.131 is expressly made subject to Family Code section 153.004 which provides another exception to the parental presumption. *See id.*. Specifically, section 153.004(b) provides in part:

> 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.

Id. § 153.004(b). The rendition of a protective order against a parent during the two-year period preceding the filing of the suit or during the pendency of the suit is relevant with respect to whether there is "credible evidence of a history or pattern of past or present . . . family violence by a parent." *Id.*§ 153.004(f).

If a parent is not appointed as a sole or joint managing conservator, the trial court must appoint that parent as a possessory conservator "unless it finds that the

appointment is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child." *Id.* § 153.191. The Family Code also prohibits a court from allowing a parent to have access to a child if "it is shown by a preponderance of the evidence that . . . there is a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit." *Id.* § 153.004(d)(1).

Courts may use the non-exhaustive list of factors identified in *Holley v. Adams* to determine the child's best interest. 544 S.W.2d 367, 371–72 (Tex. 1976); *see also In re J.J.G.*, 540 S.W.3d at 57 (using *Holley* factors to ascertain best interest of child in conservatorship case). The *Holley* factors include: the present and future physical and emotional needs of the child; the present and future emotional and physical danger to the child; the parental abilities of the persons seeking custody; the programs available to assist those persons seeking custody in promoting the best interest of the child; the plans for the child by the individuals or agency seeking custody; the stability of the home or proposed placement; acts or omissions of the parent which may indicate the existing parent-child relationship is not appropriate; and any excuse for the parent's acts or omissions. *Holley*, 544 S.W.2d at 371–72. This list of factors is not exhaustive, however, and evidence is not required on all the factors to support a best interest finding. *Id.* at 372.

C. Analysis

The evidence in this case demonstrates a history of family violence between Mother and Father, thus, rebutting section 153.131's presumption that it is in the children's best interest to appoint Mother a joint managing conservator. *See* TEX. FAM. CODE § 153.131(a)–(b); *see also In re J.J.G.*, 540 S.W.3d at 56. Specifically, Mother committed at least two acts of family violence during the applicable two-year period, namely, she physically assaulted Father in front of the children in March 2016 by kicking and hitting him, and she shot Father in May 2016. *See* TEX. FAM. CODE § 71.004 (defining "family violence"). The trial court also issued a protective order while the SAPCR was pending in which it found that Father was a victim of family violence and that Mother committed the family violence. *See id.* § 153.004(f) (requiring court to "consider whether a protective order was rendered under Chapter 85, Title 4, against the parent . . . during the two-year period preceding the filing of the suit or during the pendency of the suit" when determining whether there is "credible evidence of a history or pattern of past or present . . . family violence by a parent").

These two incidents also demonstrate the existence of a history or pattern of past or present physical abuse by Mother directed against Father, which prohibited the trial court from naming her as a joint managing conservator. *See id.* § 153.004(b); *see also Baker v. Baker*, 469 S.W.3d 269, 274 (Tex. App.—Houston [14th Dist.]

2015, no pet.) (stating single act of violence or abuse may amount to history of physical abuse for purposes of section 153.004); *see also Chacon v. Gribble*, No. 03-18-00737-CV, 2019 WL 6336184, at *4 (Tex. App.—Austin Nov. 27, 2019, no pet.) (mem. op.).[5]

Mother argues that she shot Father in self-defense and, therefore, the incident does not constitute family violence. Although "family violence" excludes "defensive measures to protect oneself," the trial court, as factfinder, was the ultimate judge of the credibility of the witnesses, the weight to be given their testimony, and could reject all or any part of their testimony. TEX. FAM. CODE § 71.004(1); *see Jordan*, 325 S.W.3d at 713. The trial court did not find either Mother or her domestic violence expert, Bassett, to be credible. *See Jordan*, 325 S.W.3d at 713; *cf. Carson v. Carson*, No. 07-16-00311-CV, 2017 WL 4341456, at *3 (Tex. App.—Amarillo Sept. 29, 2017, no pet.) (mem. op.) (stating trial court, as factfinder, was free to reject husband's argument that he was acting in self-defense and concluding that conduct qualified as "family violence" for purposes of section 71.004(1)).

[5] Father also testified that Mother hit him in the head with a light bulb in 2006. Mother argues that this testimony is inadmissible because the incident occurred more than two years before the SAPCR proceeding began. We do not need to reach this issue because, even if we were to exclude this testimony, there is evidence that Mother physically assaulted Father on at least two other occasions within two years of the SAPCR proceeding, as discussed in the text of the opinion.

Similarly, Mother argues that the shooting should not be considered "family violence" because she was not convicted of a crime and the assault charge against her was no-billed. A no-bill from a grand jury, however, is "merely a finding that the specific evidence brought before that particular Grand Jury did not convince them to formally charge the accused with the offense alleged." *Rachal v. State*, 917 S.W.2d 799, 807 (Tex. Crim. App. 1996); *see also Harris v. State*, 572 S.W.3d 325, 335 (Tex. App.—Austin 2019, no pet.). It does not mean that the incident did not occur or that it cannot qualify as an act of "family violence" for purposes of the Family Code. Furthermore, the Family Code does not require an indictment or criminal conviction for a trial court to find that an act constitutes family violence, thus, indicating that unadjudicated acts can satisfy the definition.

The trial court also found that it was not in the children's best interest to appoint her as a joint managing or possessory conservator or grant her possession of or access to the children for the time being because there is evidence that: (1) Mother took the children to California without Father's permission and did not return them to Texas until she was ordered to do so, (2) she shot Father on May 19, 2016 and "planned to commit suicide," (3) Mother has "suicidal and homicidal tendencies" and "insufficient evidence was presented that [Mother] had received adequate mental health treatment to ensure the safety of the children." The trial court also

found that allowing Mother possession or access would endanger the children's physical or emotional welfare.

Mother argues that there is no evidence that she abducted the children when she took them to California to stay with her friends and family in May 2016. However, Father testified that he did not know that Mother had taken the children to California beforehand and he did not give Mother permission to take the children out of state. Although Mother disputes Father's claims and testified that Father knew that she was going to take them to California in May because she and Father had discussed sending the kids there in the summer, the trial court did not find her testimony to be credible. As the sole factfinder, the trial court is the ultimate judge of the credibility of the witnesses and resolves any conflicts in the evidence. *See Jordan*, 325 S.W.3d at 713. When, as here, a reasonable trier of fact could have resolved conflicting evidence either way, we must presume that it did so in favor of the prevailing party. *See id*.

Mother also argues that there is no evidence that she has "homicidal tendencies," as the trial court found. It is undisputed that Mother shot Father in May 2016, and she attempted to fire multiple shots at Father, but she only shot him once because the gun jammed. There is also evidence that Mother looked for Father immediately after the shooting and when she was unable to find him, she went to the home where Father was living and intended to kill him when he arrived. The trial

court could have reasonably inferred from this evidence that Mother has "homicidal tendencies." Although she denied that she intended to harm or kill Father, the trial court did not find Mother credible, and was free to disbelieve her testimony. *See id.* (stating that factfinder is ultimate judge of witness credibility and resolves any conflicts in evidence).

Mother also argues that there is no evidence that she has "suicidal tendencies" because her expert, Bassett, found that she did not meet the clinical definition of being suicidal. Although Bassett did not expressly opine on whether Mother had suicidal tendencies, the trial court did not find Bassett to be credible, and more importantly, the contents of Bassett's report speak for themselves. Bassett's report reflects that Mother told Bassett that she drove to Father's girlfriend's home to kill herself, but she could not do it, and that when she walked out of the house with the gun, she hoped that the police would shoot her. Father also testified that Mother had expressed suicidal thoughts to him on multiple occasions, including on March 12, 2016, when she became extremely intoxicated and held a large knife to her throat and threatened to kill herself while the children were at home. Mother also repeatedly told Father's girlfriend that she would kill herself if she could not kill Father. The trial court could have reasonably inferred from this evidence that Mother has "suicidal tendencies."

There is also evidence that Mother was in a "dissociative state" when she shot Father and she was suffering from depression in March 2016. Although Mother testified that she saw a psychologist in California, she admitted that she was not in therapy at the time of trial, she was not taking medication for treatment of a mental illness, and she did not provide any evidence corroborating her testimony that she was no longer suffering from any form of depression or mental illness. The trial court did not find Mother credible, and as the sole factfinder, the trial court was free to reject her testimony and find that Mother had not "received adequate mental health treatment to ensure the safety of the children." *See id*.

There is also evidence that Mother's oldest daughter, Annie, was aware of the shooting and that Annie and Brandon were in therapy and were suffering from PTSD. Father also testified that he feared for the children's safety if Mother was granted access or possession and he was concerned that any interaction with Mother could jeopardize the progress the children had made in therapy. Aguilar, the children's guardian ad litem, opined that the children were angry and grieving over what had happened to their family and they were not ready to see Mother. She also recommended that Mother have no possession of or access to the children until she received intensive psychological treatment. Aguilar also testified that she was concerned that Mother might pose a threat to the children because Mother had recently been in "a position where she lost control" and that it "could happen again

when she's caring for the children." This evidence also supports the trial court's finding that it was not in the children's best interest to appoint Mother as a joint managing or possessory conservator or award Mother any possession of or access to the children. *See Holley*, 544 S.W.2d at 371–72 (identifying present and future emotional and physical danger to child as factor when evaluating best interest); *see also In re J.D.*, 436 S.W.3d 105, 119 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (stating factfinder may measure parent's future conduct by her past conduct when determining child's best interest). The evidence of family violence, as previously discussed, also supports the trial court's decision to deny Mother access to the children. *See* TEX. FAM. CODE § 153.004(d)(1) (prohibiting court from allowing parent to have access to child when "there is a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit").

Mother also argues that the trial court abused its discretion by allowing the guardian ad litem, Aguilar, to testify, and that we cannot consider Aguilar's testimony as evidence for purposes of our analysis. The record reflects that Mother, who was represented by counsel at trial, did not object to the admission of the testimony or evidence that she is challenging on appeal, and therefore, she has not preserved these issues for appellate review. *See* TEX. R. APP. P. 33.1(a)(1) ("As a prerequisite to presenting a complaint for appellate review, the record must show

that: (1) the complaint was made to the trial court by a timely request, objection, or motion . . . ."); *see generally Gomez v. Allstate Tex. Lloyds Ins. Co.*, 241 S.W.3d 196, 202 (Tex. App.—Fort Worth 2007, no pet.) (finding waiver when objection to admissibility of summary judgment evidence was raised for first time in motion for new trial).

Considering the evidence in the light most favorable to the trial court's judgment, disregarding all evidence and inferences to the contrary unless reasonable jurors could not do so, we conclude that there is more than a scintilla of probative evidence supporting the trial court's findings that it was not in the children's best interest to appoint Mother as a joint managing or possessory conservator or award her possession of or access to the children. *See City of Keller*, 168 S.W.3d at 810–11. Anything more than a scintilla of probative evidence is legally sufficient to support the trial court's finding. *See also In re J.J.G.*, 540 S.W.3d at 61. After considering all the evidence, we also conclude that these findings are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *Cain*, 709 S.W.2d at 176. We therefore hold that there is both legally and factually sufficient evidence supporting the trial court's finding.

Given the evidence that Mother's history of mental illness, and her violent tendencies, coupled with the lack of evidence indicating that Mother has received adequate mental health treatment and therefore no longer poses an emotional or

physical danger to the children, we cannot say that the trial court's decision to not appoint Mother as a joint managing or possessory conservator or award Mother possession or access was unreasonable. *See In re J.A.J.*, 243 S.W.3d at 616. Accordingly, we hold that the trial court did not abuse its discretion by not appointing Mother as either a managing or possessory conservator or award Mother possession or access. *See id*.

Although Mother contends that the court's order has effectively terminated her parental rights and deprived her of any involvement in her children's lives, we note that the current order is subject to possible modification in the future. *See* TEX. FAM. CODE § 156.001 ("A court with continuing, exclusive jurisdiction may modify an order that provides for the conservatorship, support, or possession of and access to a child."); *see also id.* § 156.101 (setting forth grounds for modification of order establishing conservatorship or possession and access).

Mother also complains that the trial court abused its discretion by denying her "marriage claim" in the final order and finding that she "failed to prove that [she and Father] were married" in its findings of fact and conclusions of law. According to Mother, the trial court should not have made any findings regarding whether she and Father were married because her petition for divorce was filed in a different cause

number and was a separate proceeding from the SAPCR.[6] Mother, however, submitted a "Proposed Disposition of Issues" to the trial court prior to trial in which she asked the court to grant her a divorce and "divide the property of the parties in a just and right manner." Mother also alleges that when the trial court issued its temporary orders in the conservatorship case it improperly "awarded" her home to Father, along with all her personal belongings in the home. To the extent that the court awarded Father exclusive possession of the family home in its May 2016 temporary orders, the court only awarded Father possession during the pendency of the conservatorship case and the order expired upon the issuance of the court's final order. Neither the temporary order nor the final order awarded Father real or personal property or otherwise disposed of Mother's property. We further note that Mother did not raise these concerns in her motion for new trial.

We overrule Mother's issue.

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[6] Mother's petition for divorce which was filed in a separate cause number was dismissed for want of prosecution.

Conclusion

We affirm the trial court's order.

Russell Lloyd
Justice

Panel consists of Justices Lloyd, Kelly, and Landau.