

**Affirmed and Memorandum Opinion filed August 22, 2017.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-16-00236-CV**

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**IN THE INTEREST OF M.S.G., A CHILD**

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**On Appeal from the 245th District Court  
Harris County, Texas  
Trial Court Cause No. 2014-72168**

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**M E M O R A N D U M    O P I N I O N**

In this custody dispute, M.S.G.’s mother (“Mother”) contends the trial court abused its discretion by (1) appointing M.S.G.’s biological father (“Father”) as primary joint managing conservator; and (2) failing to order Father to pay Mother retroactive child support. Because we conclude that the trial court acted within its discretion in appointing Father as primary joint managing conservator and not ordering Father to pay retroactive child support, we affirm the trial court’s order.

## BACKGROUND

We review the testimony and evidence in detail because Mother challenges multiple findings of fact the trial court made relating to Father's suitability to be primary joint managing conservator. The main areas of contention on appeal focus on whether Father (1) made a false report to CPS against Mother; (2) is mentally stable; (3) engaged in inappropriate sexual conduct with a minor; and (4) has a history of or reputation for untruthfulness.

M.S.G. was born on May 27, 2014. Father and Mother were not married at the time. Father filed a petition on December 12, 2014, to establish paternity of the child and to appoint him sole managing conservator with the exclusive right to designate the primary residence of the child. Mother filed an answer and counter-petition on January 7, 2015, requesting that the court appoint the child's parents to be joint managing conservators and give Mother the exclusive right to designate the child's primary residence.

Mother filed a first amended counter-petition on January 15, 2015, alleging that it is in the child's best interest to appoint her sole managing conservator. Father filed a first amended petition on October 19, 2015, alleging that it is in the child's best interest to appoint him sole managing conservator. Mother also filed a third amended petition<sup>1</sup> on December 7, 2015, naming Gregory Scott Takacs as co-respondent because he "is currently married to Counter-petitioner, [Mother], therefore is a necessary party to this suit." Mother requested that the court order Father to pay retroactive child support. She also alleged that it is in the best interest of the child to appoint her sole managing conservator and, alternatively, to appoint

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<sup>1</sup> The record does not contain a second amended petition.

the parents joint managing conservators and her “primary conservator with the exclusive rights to designate the primary residence of the child.”

The trial court held a bench trial on December 12, 2015, and December 28, 2015. At trial, Father testified that, after he and Mother started dating, Mother moved into his apartment in March 2013. They lived together when the child was born in May 2014. Mother left her job one month before the child was born and continued to stay at home and care for the child. Father worked and provided for Mother and the child. Father testified that at times he had “issues” with Mother’s parenting skills from the time the child was born. In particular, Father complained about “[t]he drinking and also the frustration that would occur with [Mother].”

Father testified that he and the child moved from the apartment he shared with Mother on December 7, 2014, to live with his sister Amanda. Father stated that the reason for moving out with the child was: “The excessive drinking. Primarily toward right before her and I had made the separation. [Mother] was out frequently and I would be home with [the child], although I did work long hours, I’d be home with [the child] and I just felt that it was probably the best thing at the moment for [the child].” Father called the police to be on standby while he was moving out because he did not know if Mother would cause problems when she came home.

Mother called the police in the evening on December 7, 2014, when she returned home because she was upset Father and the child had moved out. She admitted in court to making a “blatantly false report” to the police by stating that Father had assaulted her and, “after he got a hold of [the child], he grabbed a 12 gauge shotgun and told [Mother] he’d blow [her] head off.” Mother admitted she was arrested that evening and later pleaded guilty to filing a false report with law enforcement. After Mother was released from jail, she went to Amanda’s house to get the child back on December 9, 2014, and the child resumed living with Mother.

Father testified that he left about \$72 in the couple's joint bank account when he moved out but the account dropped to a negative balance when the insurance company debited the account on December 9, 2014. Father admitted to calling CPS after receiving text messages from Mother that "there is no food here" and the child is hungry and screaming. Father testified he "wanted CPS to check on our child, to make sure that she was safe and her well-being was okay and she wasn't starving." Father testified that he decided not to go to the apartment to check on the child himself because he was concerned for his safety after Mother made a false report to police earlier, and his attorney advised him to notify CPS. Father also admitted to calling the police three times between December 11, 2014, and December 21, 2014, to conduct a welfare check on the child because of "[t]ext messages that [he] received from [Mother] stating that she was just having a hard time and she couldn't do it. She didn't want to be a mother, this, that and the other."

Father testified that after the couple separated in December 2014 he gave Mother money when she texted him that she needed money to feed the child and brought food to the apartment.

The couple reconciled and Father moved back into the apartment with Mother and the child on January 11, 2015. They lived together until the beginning of June 2015 and then separated again. Although Mother claimed that Father moved in and out of the apartment twice more between June 17, 2015, and July 24, 2015, Father denied this and testified that he only stayed a night or two to see the child but never moved back in.

Father testified that, after he moved out in June 2015, he did not leave any money in the couple's joint account but helped to pay the apartment rent and brought food once a week. He stated that after the couple separated he did not pay Mother any cash to care for the child but he bought clothes, food, diapers, and "anything

[Mother] needed to provide for” the child. He also paid for the child’s daycare after Mother started working in August 2015.

Father testified that he has been paying court-ordered child support for a male child his former girlfriend Andrea, whom he dated before he met Mother, claimed is his child. Paternity of the other child had not been established at the time of trial.

Father started dating his current girlfriend Nicole in July 2015, and one month later he moved into Nicole’s home where she lives with her seven-year old son and four-year old daughter. M.S.G. has stayed at the home together with Father, Nicole, and her two children when Father had M.S.G. for visitation. According to Father, the child has developed a close and loving relationship with his girlfriend and her two children.

Mother also testified at trial. She acknowledged she wanted to reunite with Father after their first separation in December 2014. She denied Father’s claim that she would go out at night drinking after the child was born and then return and fight with Father. Mother claimed Father was drinking excessively and had “anger issues.” According to Mother, the couple reunited in January 2015 and stayed together until Father allegedly cheated on Mother. Mother testified that she has been the child’s primary caretaker since birth and that Father has not been very involved in the child’s care. Mother testified that she took the child to all doctor’s appointments and that Father only came to one emergency hospital visit. Evidence showed that Father did not attend most doctor’s visits but was with the child during several hospital visits.

Mother claimed that Father had left her with no food and means to take care of the child the first time they separated in December 2014 and later in June 2015. She testified that she was forced to take out a loan to pay for rent and denied that Father brought food or provided any financial assistance for the child besides paying

for day care and medical insurance. She testified that she started working on August 3, 2015, and that M.S.G. is in daycare while she is at work.

Mother acknowledged that Father continuously asked to have the child for overnight visits but claimed she did not allow overnight visits because she wanted to follow the agreement Father and Mother entered into, which provided for daytime visitation on certain weekends. Mother testified that another reason for her refusal to allow overnight visitation was Father's work schedule,<sup>2</sup> untrustworthiness, "anger problems," and "inconsistency with women meaning he goes from girl to girl to girl." Mother acknowledged that Father was living with Nicole at the time he asked for overnight visitation but claimed she felt the child would not be safe with Father and Nicole. Mother admitted she allowed the child to stay overnight with Father and Nicole from Friday to Sunday in August 2015 when she travelled to East Texas to visit her sister after her sister had a baby. She also admitted that she allowed Father to have the child overnight one weekend when she had to complete community hours relating to her guilty plea for filing a false report with law enforcement. Mother testified that she has "no criticism to [sic] the way" Father has cared for the child but claimed she did not know if Father loves the child or how he feels.

Mother testified that she had been legally married to a registered sex offender for ten years but that she had left him two months into the marriage and has not seen him in many years. She stated that their divorce had been finalized in Galveston County on July 29, 2015. Although Mother stated that she would show the trial court a signed divorce decree, she never produced a divorce decree and evidence at trial showed that no divorce decree had been signed and no petition for divorce had been filed at any time.

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<sup>2</sup> Father acknowledged that he had to work overtime and weekends for several weeks and was unable to exercise his visitation rights on at least three occasions.

Mother acknowledged sending a Facebook message to Nicole's ex-husband and the father of her two children regarding Father in August 2015 and resending the same message in October 2015 after she received no reply from the ex-husband. In the message, Mother stated, among other things, that (1) she recently tried to warn his ex-wife Nicole about Father but she would not listen; (2) the ex-husband should be very careful about letting his children be around Father; (3) Father had been in foster care for most of his life because he molested his female cousin and younger sister; (4) Father was in a mental institution "for trying to commit suicide numerous times;" (5) Father was diagnosed with bipolar disorder and multiple personality disorder; (6) she is in a custody battle with Father because she found out about his past from Father's older brother, grandmother, and sisters; (7) Father "impregnated a 16 year old girl named Lauryn and has 4 other children he does not tell people about;" and (8) Father is a con artist and will "manipulate, abuse, and use Nicole" and her children. Mother provided Nicole's ex-husband with Father's driver's license number and social security number so he could do a background check on Father. Mother also sent a similar Facebook message in October 2015 to Nicole's father.

Mother claimed Father had told her about everything she had written in the Facebook messages after he moved out of their apartment. Mother claimed that Father admitted he was "very mentally unstable;" he was in foster care most of his life; he molested his female cousin and younger sister; he was in a mental institution for trying to commit suicide numerous times when he was 15 years old, although she later stated that there was allegedly only one suicide attempt when he was 15 years old and another attempt when he was an adult; and he was diagnosed with bipolar disorder and multiple personality disorder.

Mother testified that Father's suicide attempt as an adult was documented in

a 2013 Seabrook Police Department Report. The Call for Service Report indicates that Father's sister Amanda called the police on January 26, 2013, and "advised her brother took something and said he wanted to end his life." The officers who arrived at Father's apartment described the service call as follows: Father "advised he had taken too many pills. [Father] was holding a bottle of [J]ack [D]aniels when officers arrived . . . officers did not locate any type of suicide note. [Father] advised he has been having social problems and is affected by ptsd.<sup>3</sup> [Father] was transported . . . without incident to [the hospital.]"

Father denied ever attempting suicide. He testified regarding the January 26, 2015 incident that he never told his sister he was going to commit suicide. He testified: "I had a stroke of bad luck. I lost my job. Things weren't looking up for me and I decided to get a bottle of Jack Daniels, go home and drink myself to where I was just completely obliterant (sic). I took a few Tylenol P.M. I freaked out. I texted my sister and I said, you know, 'I'm not doing too well.' She — she then called the police and they came to my aid." Father also testified that he does not recall telling the officers that night that he "had been having social problems and it's affected by PTSD" because he was "heavily intoxicated that night" and therefore does not recall what he said.

He acknowledged that he felt distress when he "watched a very dear friend" die in Afghanistan some time in the past but he denied having any "flashbacks or problems since then that might affect" the child, and there have not occurred "any kind of events with [his] mind and [his] body that might affect [his] functioning." Father denied having a drinking problem or anger management problem and testified that no one ever told him he had such problems.

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<sup>3</sup> PTSD stands for post-traumatic stress disorder.

Father acknowledged that when he was five years old his older brother Dustin molested him; Father told his grandmother about the molestation and Dustin was sent to live in Oklahoma. Father testified he was removed from his home by CPS for a period of time because his older sister Amanda made false accusations. Father also denied molesting his cousin, sister, or anyone else.

In support of her case, Mother called Father's sister Amanda as a witness. Amanda testified that Father moved into her home with the child on December 10, 2014, because Father told her he and Mother were fighting too much. Amanda testified that Father did not take care of the child for the two days the child was in Amanda's home. Amanda testified that Father should not be the primary custodial parent because he has anger issues and is mentally unstable and too worried about himself to take care of a young child. Amanda claimed that she had to call an ambulance in January 2013 because Father sent her a text message saying "he was going to end his life." Amanda also claimed Father attempted suicide many times since he was young. Amanda stated that when she was 16 years old Father was once taken to a mental institution when he tried to kill himself in a group home after he and his siblings had been removed from their parents' care by CPS because of allegations of child abuse.

Amanda testified that Father was not diagnosed with PTSD; she claimed Father was diagnosed with multiple personality disorder while he was in CPS care. Amanda testified that she witnessed Father sexually molesting their stepsister. She also claimed that Father has anger management issues and that she witnessed multiple road rage incidents. Amanda testified that Mother is a good mom, who took very good care of the child and did everything the child needed.

During cross-examination, Amanda admitted that she was at first very dedicated to Father and enthusiastic about helping him in this case despite the fact

that she allegedly observed Father molesting their sister, Father being mentally unstable, and Father having road rage and anger management issues. Amanda even memorialized for Father's attorney a time when Mother placed the child in an unsafe environment. Amanda wrote that she went to visit the child and Mother on November 26, 2014, and observed that Mother had placed the child on the kitchen counter next to the stove while having a pan with hot grease on the stove popping. According to Amanda, Mother refused to move the child who was just inches away from the stove so Amanda grabbed the child.

Amanda admitted she was "furious" when she found out via Facebook that Father and Mother had reconciled in January 2015. She claimed she changed her mind about helping Father because he lied to her the four to six weeks he was living at her home and tried to get back together with Mother the whole time. Amanda also claimed Father tried to see other women at her home.

Amanda further admitted that she pleaded guilty to theft between \$1,500 and \$20,000 in 2010 and was placed on deferred adjudication for four years. She claimed the theft charge was not her fault because the caseworker had not completed her food stamps application and she "got in trouble" for receiving benefits while working.

Mother also called Father's former girlfriend Andrea as a witness. Andrea testified that she started dating Father in November 2010 and has a son with him for whom Father pays court-ordered child support. She testified that she and Father separated in July 2012 after an "on-again off-again" relationship during which Andrea claimed Father never physically abused her but abused her mentally and emotionally and cheated on her.

Andrea testified that Father never asked for visitation with her son and there is no visitation scheduled because she believes no visitation is for safety reasons in her son's best interest. However, Andrea acknowledged that her main concern was

that Father “never spent a moment alone with my child, never had much really to do with him.” Andrea admitted that paternity for her son has not been established yet and there never has been a court date regarding the son’s custody. She also admitted that Father was the one who filed the paperwork with the Attorney General’s Office to start paying child support for her son.

Andrea testified that Father told her he had been in CPS care when he was a teenager and attempted suicide when he was 15 or 16 years old. Father also told her that his brother had sexually molested him, but Father never told her that he molested any of his family members. Andrea testified that she believes Father cannot be trusted, he is a pathological liar, and he has anger management issues. She admitted that she had no interaction with Father in the past three to four years except when papers needed to be signed.

Father’s dad Donald testified in support of Father. Donald testified that he has always been close to his family and remembers what has happened with his family and children over the years. Donald testified that he has never thought or known Father to be mentally unstable, and Father has never been “diagnosed to be mentally unstable” or to have bipolar disorder or multiple personality disorder. Donald testified that Father never attempted suicide and never was in a mental institution for attempting suicide.

According to Donald, Father never molested a female cousin or his younger sister. He testified that Father was not in foster care for most of his life. Donald recalled that Father and all of his five children were removed by CPS after his oldest daughter Amanda called CPS and told “a bunch of lies” because she was angry she was not allowed to move in with her boyfriend. CPS apologized to Donald “once they figured out what was really going on.” Donald believed the children were in CPS care for about three months but he could not remember dates because “it was

many, many years ago. . . . Something you kind of want to forget about, you know.” Donald believed Father was 11 or 12 years old when CPS let him go home.

Donald testified that he sees Father and the child when they come to visit and Father has a good relationship with the child as well as with Nicole’s two children. Father recalled witnessing an argument between Father and Mother at the child’s first birthday party in May 2015. He did not hear the entire argument but heard that the argument arose because Mother had a few beers and Father did not want Mother to drive the child home but wanted the child to ride home with Father.

Nicole’s dad David also testified in support of Father at trial. He testified that his daughter and Father started dating about six months ago and are a “loving couple” and “get along great.” David believes Father is “a good father, good individual.” David observed Father and the child interact on about ten different occasions. According to David, Father loves the child very much, they “interact very well,” and Father and Nicole’s children love each other very much.

David never “observed or thought” Father to be mentally unstable. Father never told David he was “diagnosed as being mentally unstable,” was in a mental institution for trying to commit suicide or for any other reason, was diagnosed with bipolar disorder or multiple personality disorder, was in foster care for most of his life, or was in foster care because he molested a female cousin. David testified that Father never told him he tried to commit suicide on several occasions or that he molested his sister, his cousin, or anyone else.

David testified that he received Mother’s Facebook message but had no concerns after he talked to Father and Nicole. David also thought that what Mother had written in the message “sounded like more BS than anything.” David testified that he has no concerns or objections with regard to his daughter being in a relationship with Father.

Finally, Nicole testified at trial. She stated that she started dating Father in July 2015, and one month later he moved into her home where she lives with her two children. Nicole testified that Mother never tried to contact her but that Mother sent Facebook messages to her dad and ex-husband. Nicole testified that her ex-husband was at first concerned when he received Mother's message but, after he conducted a background check and an investigation and also spent time with Father, ex-husband trusts Father and has no objection to his two children being around Father.

Nicole testified that after her dad received Mother's message he also did a background check on Father. She testified that her "dad loves [Father] and he said that this was just so over the top and dramatic that he didn't even want to acknowledge it." According to Nicole, Father was upset about Mother's messages but he did not want to retaliate against Mother because "[a]ll he wants is his child."

Nicole testified that Father told her he had been in CPS care as a teenager for about a year because his sister made a false report that his parents were beating the children and Father and his siblings were removed from the home. Nicole also testified that Father told her he had been in a mental facility for one week because he was rebelling as a teenager. Nicole stated that Father never said he molested his cousin and younger sister, but he did tell her that his brother molested him. Father never told her he was diagnosed as being bipolar or mentally unstable or having multiple personality disorder. Father also never told her he attempted suicide whether in foster care or at any other time. Regarding the January 2013 event when Father got drunk and took pills, Father told Nicole it was not a suicide attempt but that "he got extremely drunk." Nicole never observed Father to be "mentally unstable."

Nicole testified that Father does not drink on a daily basis and only drinks

socially. She also testified that she has concerns regarding Mother if the trial court appoints Father to be the primary joint managing conservator. She testified that, since she and Father “have been dating, he has been harassed through text message, phone calls nonstop by [Mother] and I feel like it won’t stop.”

Nicole testified that she believes Father should be “the primary parent” because “it’s best for the child and he’s an amazing parent,” and the child loves Father. Nicole stated that Father “is the most amazing father I’ve ever seen and [the child]’s so happy when she’s with him and he just lights up like a Christmas tree when he sees her face. And I’ve never seen a man so emotionally attached to his child. It’s a bond that I wish that my kids’ father had with them.”

After hearing the evidence, the trial court appointed Father as primary joint managing conservator. The trial court signed an “Order Adjudicating Parentage And Final Orders in Suit Affecting Parent-Child Relationship” on December 31, 2015, appointing Father and Mother joint managing conservators and designating Father the “Primary Joint Conservator for all purposes.” Father signed the trial court’s order; Mother did not sign the order. Mother filed a motion for new trial on January 12, 2016, which the trial court denied on March 1, 2016. Mother filed a notice of appeal on March 22, 2016. The trial court filed findings of fact and conclusions of law on March 31, 2016.

### **ANALYSIS**

Mother challenges the trial court’s order in two issues arguing that the trial court abused its discretion by (1) appointing Father to be the child’s primary joint managing conservator; and (2) failing to order Father to pay retroactive child support. We will address each issue in turn.

## **I. Primary Joint Managing Conservatorship**

Mother argues in her first issue that the trial court abused its discretion by concluding that it is in the child's best interest to appoint Father to be the primary joint managing conservator because (1) there is insufficient evidence to support the trial court's findings that Father did not make a false report to CPS, Father was not mentally unstable, Father did not engage in inappropriate sexual conduct with a minor, Father did not have a history or reputation for untruthfulness; and (2) the trial court placed the child in an unstable home.

Trial courts have wide discretion with respect to custody, control, possession, support, and visitation matters. *In the Interest of K.S.*, 492 S.W.3d 419, 426 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). Therefore, we review managing conservatorship determinations for abuse of discretion. *Id.* Generally, a trial court abuses its discretion by acting arbitrarily, unreasonably, or without reference to any guiding rules or principles. *In re Marriage of Butts*, 444 S.W.3d 147, 153 (Tex. App.—Houston [14th Dist.] 2014, no pet.). The failure to analyze or apply the law correctly constitutes an abuse of discretion. *In re C.A.M.M.*, 243 S.W.3d 211, 214 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). The fact that a trial court may decide a matter within its discretionary authority in a different manner than an appellate court in a similar circumstance does not demonstrate an abuse of discretion. *Id.* A trial court does not abuse its discretion as long as some evidence of a substantive and probative character exists to support the trial court's decision. *Id.*

Custody disputes are inherently fact-intensive. *Van Heerden v. Van Heerden*, 321 S.W.3d 869, 874 (Tex. App.—Houston [14th Dist.] 2010, no pet.). We also are mindful that the trial court is “best able to observe and assess the witnesses’ demeanor and credibility, and to sense the ‘forces, powers, and influences’ that may

not be apparent from merely reading the record on appeal.” *In re A.L.E.*, 279 S.W.3d 424, 427 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (quoting *Niskar v. Niskar*, 136 S.W.3d 749, 753 (Tex. App.—Dallas 2004, no pet.)). Therefore, we defer to the trial court’s resolution of underlying facts and to credibility determinations that may have affected its determination, and we will not substitute our judgment for that of the trial court. *Id.*

When the proper standard of review is abuse of discretion, challenges to the legal and factual sufficiency of the evidence are not independent grounds for reversal; instead, they are factors to be considered in determining whether the trial court abused its discretion. *See In the Interest of K.S.*, 492 S.W.3d at 426. To determine if the evidence is legally sufficient, we review the entire record, considering evidence favorable to the finding if a reasonable factfinder could, and disregarding contrary evidence unless a reasonable factfinder could not. *Thornton v. Cash*, No. 14-11-01092-CV, 2013 WL 1683650, at \*10 (Tex. App.—Houston [14th Dist.] Apr. 18, 2013, no pet.). In addition, we indulge every reasonable inference that would support the factfinder’s finding. *Id.* In a legal sufficiency review, the factfinder is the sole judge of the witnesses’ credibility and the weight to be given their testimony. *Id.* The evidence is legally sufficient if it would enable reasonable and fair-minded people to reach the decision under review. *Id.*

In reviewing factual sufficiency, we must examine the entire record, considering evidence both in favor of and contrary to the challenged findings. *Id.* at \*11. We may set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.* We cannot substitute our judgment for that of the factfinder. *Id.* If there is sufficient competent evidence to support the factfinder’s decision, it must be upheld. *Id.* We may not weigh the

witnesses' credibility or interfere with the factfinder's resolution of conflicts in the evidence. *Id.*

In an appeal from a bench trial, findings of fact are the equivalent of jury answers to special issues. *Echols v. Olivarez*, 85 S.W.3d 475, 477 (Tex. App.—Austin 2002, no pet.). The reviewing court cannot substitute its conclusions for those of the trial court if there is sufficient competent evidence of probative force to support the trial court's findings. *Id.*

After assessing the sufficiency of the evidence, we determine whether, based on the evidence, the trial court made a reasonable decision. *Thornton*, 2013 WL 1683650, at \*11. We will affirm the decision unless it is arbitrary or unreasonable. *Id.*

In determining conservatorship and possession issues, the best interest of the child always is the primary consideration. Tex. Fam. Code Ann. § 153.002 (Vernon 2014); *Lenz v. Lenz*, 79 S.W.3d 10, 14 (Tex. 2002). “The public policy of this state is to: (1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child; (2) provide a safe, stable, and nonviolent environment for the child; and (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.” *Id.* § 153.001(a) (Vernon 2014).

#### **A. Unstable Home**

We begin by addressing Mother's contention that the trial court abused its discretion by appointing Father to be the child's primary joint managing conservator because the trial court placed the child in an unstable home.

Mother points to the trial court's comments that Mother should file a motion to modify conservatorship “the day after [Nicole] throws [Father] out, if that occurs.”

She characterizes these comments as “an acknowledgement that the home the trial court was making for the child was unstable” and an implicit acknowledgment that “it would be in the child’s best interest for [Mother] to be appointed the child’s primary conservator” rather than Father. Mother contends that, “[i]n believing that the child would eventually become homeless after [Father] was made the primary conservator, the trial court ignored Texas’s public policy to ‘provide a stable environment for the child.’”

Mother’s argument is not supported by the evidence. Contrary to Mother’s assertion, the trial court’s comments are not an acknowledgement that the home the court designated for the child to reside in with Father and Nicole is currently unstable. Nor is it an acknowledgement that “it would be in the child’s best interest for [Mother] to be appointed the child’s primary conservator rather than” Father.

At most, the court’s comments are an acknowledgment that Father and Nicole may separate some time in the future — as any other couple might — and Father may not immediately have a suitable home to move to with the child or may not have someone to care for the child when he has to work overtime or weekends. Such circumstances could constitute a material and substantial change in circumstances potentially warranting modification of conservatorship under Texas Family Code section 156.101. *See* Tex. Fam. Code Ann. § 156.101(a) (Vernon 2014) (providing, among other things, that the “court may modify an order that provides for the appointment of a conservator of a child, that provides the terms and conditions of conservatorship, or that provides for the possession of or access to a child if modification would be in the best interest of the child” and “the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed”).

Mother points to no evidence that the child currently lives in an unstable

situation with Father, Nicole, and her two children in Nicole's home. The possibility of a future breakup between Father and Nicole is not evidence that the child's designated home is currently unstable.

There also is no support in the record for Mother's contention that the trial court believed "the child would eventually become homeless."

Further, we find no basis for Mother's assertion that the trial court "effectively" appointed Nicole as "the person with the exclusive right to designate the child's primary residence" by designating her home to be the child's primary residence. The trial court ordered Nicole's home to be the child's primary residence because Father, whom the court appointed to be the primary joint managing conservator, lives with Nicole and her two children in the home. Designating Nicole's home as the child's primary residence does not mean the trial court "effectively" appointed Nicole to be "the person with the exclusive right to designate the child's primary residence." Additionally, nothing in the trial court's order supports Mother's argument.

We reject Mother's arguments that the trial court abused its discretion by appointing Father to be the child's primary joint managing conservator because the trial court placed the child in an unstable home.

## **B. Findings of Fact**

We now turn to Mother's argument that the trial court abused its discretion by concluding that it is in the child's best interest to appoint Father to be the primary joint managing conservator because there is insufficient evidence to support the trial court's findings that Father (1) did not make a false report to CPS; (2) was not mentally unstable; (3) did not have inappropriate sexual conduct with a minor; and (4) did not have a history or reputation for untruthfulness.

## **1. False Report**

We first address Mother's contention that there is insufficient evidence to support the trial court's Finding of Fact No. 28 that Father "did not make false reports to CPS regarding the care of his child."

Mother contends the evidence does not support the court's finding because Father testified that he (1) dropped off food after Mother sent him a text message informing him there was no food for the child; and (2) notified CPS that Mother was not feeding the child. Mother claims that, because "[i]t cannot be true that [Father] both provided food for the child—as he testified and as the court found—and truthfully reported to [CPS] that [Mother] was not feeding the child," there is insufficient evidence to show Father's call to CPS was not a false report.

Contrary to Mother's assertion, Father testified that he had been providing for the child after the couple separated in December 2014 and "would bring food to the home." The evidence shows that Mother sent text messages to Father stating that the child is hungry, "there is no food here," "bring your child some food I beg you," and "there is no more food here I gave [the child] the last thing and she [is] screaming she's hungry." Father testified that when he received Mother's messages he at first wanted to go to the apartment to check on the child but decided not to go because he was concerned for his safety after Mother had made a false report about him to police earlier. Father stated that he contacted his attorney after he received Mother's messages and his attorney told him to notify CPS; Father's attorney confirmed that he advised Father to call CPS. Father testified he called CPS because he "wanted CPS to check on our child, to make sure that she was safe and her well-being was okay and she wasn't starving."

We conclude that the evidence is sufficient to support the trial court's finding that Father did not make a false report to CPS.

## 2. Mental Health

We next address Mother's argument that there is insufficient evidence to support the trial court's Finding of Fact No. 38, which states that "[Mother's] allegations of [Father] having an unstable mental history were not supported by credible evidence."

Mother argues that Father's drinking and taking Tylenol P.M. and then requiring medical attention on January 25, 2013, "cannot be considered mentally stable actions." Mother also argues that Father has not testified about what treatment he has received or is receiving for any alleged PTSD. According to Mother, Father's unstable mental health history is established by (1) her testimony that Father told her he twice attempted suicide; (2) Father's sister Amanda's testimony that he had attempted suicide many times since he was young and has "anger issues;" and (3) former girlfriend Andrea's testimony that Father has "anger issues" and he told her he attempted suicide once when he was a teenager.

Contrary to mother's contention, there is sufficient evidence to support the trial court's finding that Mother's "allegations of [Father] having an unstable mental history were not supported by credible evidence," and the evidence does not establish that Father has a history of mental instability.

Father denied attempting suicide; and even though one incident of drinking and taking Tylenol P.M. is evidence of a poor decision, it is not evidence of Father having a history of mental instability. Father denied having a drinking problem or anger management issues. He also testified that, although he felt distress when he witnessed a friend's death in Afghanistan, he had no "flashbacks or problems since then that might affect" the child and there were no "events with [his] mind and [his] body that might affect [his] functioning."

Father's dad Donald, Nicole, and Nicole's dad David all testified that Father never told them he attempted suicide, and they never observed Father be mentally unstable. Donald also testified that Father never attempted suicide, never was diagnosed as being mentally unstable, and never was in a mental institution for attempting suicide.

Further, “[i]n a bench trial, the trial court is the sole judge of the credibility of the witnesses, assigns the weight to be given their testimony, may accept or reject all or any part of their testimony, and resolves any conflicts or inconsistencies in the testimony.” *In re C.Y.C.*, No. 14-11-00341-CV, 2012 WL 3223674, at \*8 (Tex. App.—Houston [14th Dist.] Aug. 9, 2012, pet. denied) (mem. op.). Therefore, the trial court was free to believe the testimony of Father, Donald, Nicole, and David. The trial court was also free to disbelieve Mother, who testified untruthfully during trial and admitted to making a false report to law enforcement alleging Father assaulted her and threatened her with a shotgun.

The trial court likewise was free to reject former girlfriend Andrea's testimony based on a bad break-up with Father. And the trial court was free to disbelieve Amanda's testimony regarding Father's alleged mental health problems after hearing that she pleaded guilty to theft charges and made false charges of abuse against her parents, which caused CPS to remove her, Father, and other siblings from their parents' home.

We conclude that the evidence is sufficient to support the trial court's finding that Father does not have an unstable mental health history.

### **3. Sexual Conduct**

Finding of Fact No. 39 states that “[Mother's] allegations of [Father] having a history of inappropriate sexual conduct with a female while both were minors were

not supported by credible evidence.” Mother argues that, although Father testified “he did not molest his cousin or stepsister, his sister Amanda testified that she witnessed the abuse” and Father’s “self-serving denial was not credible.” Therefore, she contends the evidence to support this finding is against the great weight and preponderance of the evidence.

At trial, Mother claimed that, after Father moved out of their apartment, he told her that he had molested his female cousin and his younger sister. Father’s sister Amanda testified that she witnessed her brother sexually molesting their stepsister when he was a teenager.

Father denied molesting his cousin, sister, or anyone else. Father’s dad Donald also testified that Father never molested a female cousin or his sister. Father’s former girlfriend Andrea and his current girlfriend Nicole both testified that Father never told them he had molested a family member.

Considering that the trial court as the factfinder is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and that we may not weigh the witnesses’ credibility or interfere with the factfinder’s resolution of conflicts in the evidence, we conclude that there was sufficient evidence to support the trial court’s finding that Mother’s allegations that Father has “a history of inappropriate sexual conduct with a female while both were minors were not supported by credible evidence.” *See Matter of Marriage of Merrikh*, No. 14-14-00024-CV, 2015 WL 2438770, at \*5 (Tex. App.—Houston [14th Dist.] May 19, 2015, pet. denied) (mem. op.); *Thornton*, 2013 WL 1683650, at \*11.

#### **4. Untruthfulness**

Mother asserts that the evidence is insufficient to support the trial court’s Finding of Fact No. 47, which states that “[Mother’s] allegations of [Father] having

a history and/or reputation of untruthfulness were not supported by credible evidence.” She points to the trial court statements that Mother and Father both are “pathological liars” and that Father has been “conning women for years.”

The trial court’s statement does not establish that there is insufficient evidence to support Finding of Fact No. 47. The trial court could have disbelieved Mother’s allegations regarding Father’s truthfulness while also believing that Father was dishonest in his testimony about certain things or events.

More importantly, even if Father was untruthful in some aspects of his testimony, the trial court’s determination that it is in the child’s best interest to appoint Father as the primary joint managing conservator was not an abuse of discretion. The parties presented “evidence of a substantive and probative character” and the trial court made numerous unchallenged findings of fact that support its decision.

The trial court stated that Mother was a pathological liar and expressed doubt about her honesty and credibility numerous times during trial. Mother admitted that she pleaded guilty to making a “blatantly false report” to law enforcement because she was upset Father had moved out with their child. Evidence showed that Father brought food, clothing, and other supplies and provided for the child at all times since birth.

Mother admitted sending Facebook messages to Nicole’s dad and ex-husband containing numerous damaging allegations about Father. The court concluded that Mother’s messages “stated falsehoods about [Father],” and Mother does not challenge these findings. Mother also does not challenge the trial court’s finding that the messages Mother sent to Nicole’s dad and ex-husband “were calculated to cause problems for and retaliate against” Father. There is evidence that Father never retaliated against Mother even after she sent the Facebook messages.

Evidence also showed that Mother still was married to a lifetime registered sex offender at the time of trial, even though she testified that she had been divorced since July 29, 2015. Except for Mother, only Amanda testified in favor of Mother being appointed as primary joint managing conservator; Amanda testified Mother is a good mom who took very good care of the child and did everything the child needed.

Mother does not challenge the trial court's findings that Father "has maintained a close and loving relationship with the child" and that a "close and loving relationship has been established between [Father], [Nicole] and her two children." Evidence presented at trial supports these trial court findings. Father's dad testified that Father has a good relationship with the child and Nicole's two children. Nicole's dad testified that Father is "a good father," "loves [the child] very much," and has a very good relationship with the child. Nicole confirmed that Father is "the most amazing father" and the child is very happy to be with Father.

After reviewing the entire record and giving great deference to the trial court's ability to observe the witnesses and assess intangibles not apparent in the written record, we conclude that the trial court (1) had sufficient information upon which to exercise its discretion to determine that it is in the child's best interest to appoint Father as the primary joint managing conservator; and (2) did not err in its application of that discretion. *See In re C.Y.C.*, 2012 WL 3223674, at \*15; *see also Allen v. Allen*, 475 S.W.3d 453, 456 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

Accordingly, we overrule Mother's first issue.

## **II. Retroactive Child Support**

Mother contends in her second issue that the trial court abused its discretion

by not ordering Father to pay \$218 per month in retroactive child support for August 2015 until November 2015. Mother contends that, although Father paid for the child's daycare, he "provided no other financial assistance" and the amount of retroactive child support Mother "requested would not be an undue financial hardship on" Father.

A court may order a parent to pay retroactive child support if the parent has not previously been ordered to pay support for the child and was not a party to a suit in which support was ordered. Tex. Fam. Code Ann. § 154.009(a) (Vernon 2008); *In re J.M.C.*, No. 2-09-292-CV, 2010 WL 2889671, at \*2 (Tex. App.—Fort Worth July 22, 2010), no pet.); *Miles v. Peacock*, 229 S.W.3d 384, 389 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Garza v. Blanton*, 55 S.W.3d 708, 709 (Tex. App.—Corpus Christi 2001, no pet.). In ordering retroactive child support, the trial court must consider the net resources of the obligor during the relevant time period and whether (1) the mother of the child had made any previous attempts to notify the obligor of his paternity or probable paternity, (2) the obligor had knowledge of his paternity or probable paternity, (3) the order of retroactive child support will impose an undue financial hardship on the obligor or the obligor's family, and (4) the obligor has provided actual support or other necessities before the filing of the action. Tex. Fam. Code Ann. § 154.131(b) (Vernon 2008); *In re J.M.C.*, 2010 WL 2889671, at \*2; *In re Guthrie*, 45 S.W.3d 719, 727 (Tex. App.—Dallas 2001, pet. denied).

Retroactive child support is not mandatory; rather, a trial court has discretion in deciding whether to award retroactive child support and the amount of such an award. See Tex. Fam. Code Ann. §§ 154.009, 154.131(b); *Randolph v. Randolph*, No. 14-04-00180-CV, 2005 WL 2276873, at \*1 (Tex. App.—Houston [14th Dist.] Sept. 20, 2005, no pet.) (mem. op.); *In re Guthrie*, 45 S.W.3d at 727. Therefore, we

will not reverse a trial court's refusal to award retroactive child support absent an abuse of discretion. *In re J.M.C.*, 2010 WL 2889671, at \*2; *Randolph*, 2005 WL 2276873, at \*1. A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *In re J.M.C.*, 2010 WL 2889671, at \*2; *Randolph*, 2005 WL 2276873, at \*1. A trial court does not abuse its discretion when some evidence of a substantive and probative character supports the trial court's decision. *In re J.M.C.*, 2010 WL 2889671, at \*2; *Randolph*, 2005 WL 2276873, at \*1.

Here, although Mother claims that Father "provided no other financial assistance" besides paying for the child's daycare, text messages admitted at trial show the contrary. Further, evidence shows that Father continuously provided for the child since birth, including paying \$382.42 monthly for the child's medical insurance and \$845 monthly for daycare. Father testified that after he and Mother separated he bought the child food, clothes, and "[a]nything that [Mother] needed to provide for [the child]." Father testified that, although he did not pay Mother any cash as child support, he provided necessities for the child. He also testified: "[Mother] would send me a text message saying that [the child] was hungry, she's low on food, I'd bring her food. I'd bring her diapers, I'd bring her wipes."

Based on the record before us, the trial court could have concluded that Father provided sufficient financial support for the child so that retroactive child support was not warranted. *See In re J.M.C.*, 2010 WL 2889671, at \*3-4 ("Juan's payment of some of J.M.C.'s expenses during Gabriela's pregnancy and the early part of J.M.C.'s life could have supported the trial court's refusal to order retroactive child support" . . . and "assuming that Gabriela's argument regarding Juan's lack of undue hardship is correct, the facts described above still comprise at least some evidence of substantive and probative character to support the trial court's denial of retroactive

support.”); *Randolph*, 2005 WL 2276873, at \*2 (“[E]ven if the amount of voluntary support was limited, the trial court acted within its discretion if it denied retroactive support because Randy had paid some voluntar[y] support.”); *Garza*, 55 S.W.3d at 710-11 (even though the record contained “no evidence that the award of retroactive child support would impose an undue financial hardship on the appellee,” the trial court’s denial of retroactive child support was not an abuse of discretion because the record showed “that the judge considered the \$2,000 given by appellee prior to the birth of the child, along with other payments,” and the trial court could have decided “that appellee had already contributed enough money for support”); *Guthrie*, 45 S.W.3d at 729 (holding that a father’s voluntary payment of some expenses for the child could have factored into the trial court’s decision to deny retroactive child support even though the payment did not equal the amount that would have been due under statutory guidelines). Therefore, we hold that the trial court acted within its discretion by denying Mother retroactive child support.

Accordingly, we overrule Mother’s second issue.

### CONCLUSION

We affirm the trial court’s order.

/s/ William J. Boyce  
Justice

Panel consists of Justices Boyce, Busby and Wise.