Affirmed and Memorandum Opinion filed June 22, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00319-CV

IN THE MATTER OF THE MARRIAGE OF KIMBERLY KOENIG AND CHARLES HEATH KOENIG

On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Cause No. 70204

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

Appellant Charles Heath Koenig appeals a final judgment in a suit to modify the parent-child relationship. We affirm.

BACKGROUND

Charles and Kimberly (Koenig) Baize divorced on November 15, 2013. In the final divorce decree, Charles and Kimberly were appointed joint managing conservators of their three children. Charles was given the exclusive right to designate the children's primary residence. Neither Charles's nor Kimberly's access to the children required supervision.

Charles brought a petition to modify the parent-child relationship alleging the children's circumstances materially and substantially had changed. He requested, among other things, that Kimberly be denied access to the children or that her periods of access be supervised. Kimberly filed a cross petition to modify the parent-child relationship. Kimberly requested, among other things, that Charles be denied access to the children and that she be appointed the sole managing conservator. Charles nonsuited his petition and the parties proceeded to trial on the issues raised in Kimberly's petition.

A bench trial occurred in December 2015. Among other witnesses, the trial court heard testimony from psychologist Maria Alvarez and Carolyn Holley, an investigator appointed to conduct a social study. The trial court signed a "Final Judgment in Suit to Modify Parent-Child Relationship" on March 3, 2016. The trial court ordered that Charles and Kimberly continue as joint managing conservators with Kimberly having the exclusive right to designate the children's primary residence. The trial court further ordered that Charles's access to the children would be limited as set out in six steps. If Charles successfully completed each one, then step six allowed visitation under a standard possession order.

This appeal followed.

ANALYSIS

Charles challenges the trial court's March 2016 judgment modifying conservatorship. In his first issue, Charles contends the judgment rests on legally insufficient evidence and the trial court erred in relying on expert testimony from psychologist Maria Alvarez. In his second issue, Charles contends he received ineffective assistance of counsel during the trial. Finally, in his third issue, Charles contends his due process rights were violated with respect to notice of the April 12, 2016 hearing on temporary orders.

An appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(i). An appellant's failure to comply with this rule may result in waiver of issues on appeal. *See, e.g., Canton–Carter v. Baylor Coll. of Med.*, 271 S.W.3d 928, 931-32 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The argument in Charles's brief is not clear and does not contain appropriate citation to authorities and the record. Nonetheless, briefing rules should be construed liberally, and "appellate courts should reach the merits of an appeal whenever reasonably possible." *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008); *see also* Tex. R. App. P. 38.1(f), 38.9. To the extent reasonably possible, we address Charles's contentions on appeal.

I. Temporary Orders Pending Appeal

As an initial matter, we address Charles's contention that our review of the trial court's March 2016 judgment encompasses a review of the trial court's temporary orders signed on April 14, 2016, after the judgment was signed. *See* Tex. Fam. Code Ann. § 109.001 (Vernon 2014).

Kimberly filed a motion for temporary orders on March 21, 2016. *See id*. A hearing was held on the temporary orders motion on April 12, 2016, and temporary orders were signed two days later. In its temporary orders, the trial court suspended the March 2016 final judgment. Kimberly was appointed as the children's temporary sole managing conservator. Charles was appointed the temporary sole possessory conservator and ordered to have no contact with the children. Charles filed a notice of appeal as to the temporary orders; our court dismissed the appeal because we lacked jurisdiction to consider it. *See In re Matter of Marriage of Koenig*, No. 14-16-00369-CV, 2016 WL 5491428 (Tex. App.—Houston [14th Dist.] Sept. 29, 2016, no pet.) (mem. op.).

A temporary order under section 109.001 is not subject to interlocutory appeal. *See* Tex. Fam. Code Ann. § 109.001(c); *see also Marcus v. Smith*, 313 S.W.3d 408, 416 (Tex. App.—Houston [1st Dist.] 2009, no pet.) ("we lack jurisdiction over [appellant's] direct appeal concerning . . . the temporary order under section 109.001"); *In re Gonzalez*, 993 S.W.2d 147, 162 (Tex. App.—San Antonio 1999, pet. denied) (stating mandamus, not a direct appeal, is the appropriate remedy to attack an order under section 109.001); *Johnson v. Johnson*, 948 S.W.2d 835, 838 (Tex. App.—San Antonio 1997, writ denied) (same); *but see In re Moore*, 511 S.W.3d 278, 286 (Tex. App.—Dallas 2016, no pet.) (stating review of the merits of a section 109.001 order in conjunction with the appeal from the final judgment was not prohibited). Here, the final judgment was signed on March 3 and notice of appeal was filed March 31, 2016. The temporary orders were signed April 14 and are specifically designated "temporary orders pursuant to Texas Family Code § 109.001." Mandamus is the appropriate remedy to attack a temporary order under section 109.001. *In the Matter of Marriage of Koenig*, 2016 WL 5491428, at *1; *Marcus*, 313 S.W.3d at 416. We conclude that we lack jurisdiction to consider Charles's complaints on appeal insofar as he challenges the temporary orders. Our analysis is limited to the March 2016 judgment.

In Charles's third issue, he contends he was denied due process due to a lack of notice related to the temporary orders hearing. Because we do not have appellate jurisdiction over Charles's issues to the extent they are based on the temporary orders, we do not address this issue.

II. Evidentiary Basis of the Trial Court's Judgment

Charles challenges legal sufficiency of the evidence and also the admission of expert testimony. Although these are two distinct inquiries, he lumps them together by arguing that there is no evidence to support the trial court's judgment

because the trial court relied on expert testimony from Dr. Alvarez that she was not qualified to give. Because these are two distinct inquiries, we will address admission of Dr. Alvarez's testimony and legal sufficiency of the evidence separately.

A. Expert Testimony

Charles's appellate challenge focuses in part on the admission of expert testimony by Maria Alvarez, Ph.D. Charles appears to challenge only Dr. Alvarez's qualifications as an expert — not whether her testimony is relevant or based on reliable information. We interpret his argument as a contention that Dr. Alvarez's testimony was inadmissible under Texas Rules of Evidence 701 and 702.[1]

Kimberly contends that Charles has waived error as to Dr. Alvarez's qualifications and testimony by failing to object at trial. A challenge to an expert's qualifications must be preserved with a timely and specific objection. *See* Tex. R. App. P. 33.1; *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 143-44 (Tex. 2004). For purposes of our review, we presume Charles preserved error on this issue.

"'If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.'" *Cooper Tire & Rubber Co.*

[1] In his brief, Charles contends "[p]er [Texas Rule of Evidence Rule] 702, [m]ore simply put there must be an issue before the jury that is outside the lay general public's general knowledge and experience and the expert must be deemed qualified to offer an opinion on the applicable standards of care based on training and experience. In the matter at hand, the expert offered by Appellee, Dr. Maria Alvarez, and accepted by the court, clearly did not meet such criteria." We construe this contention as primarily challenging Dr. Alvarez's qualifications.

v. Mendez, 204 S.W.3d 797, 800 (Tex. 2006) (quoting Tex. R. Evid. 702); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588-89 (1993). Expert testimony is admissible when (1) the expert is qualified, and (2) the testimony is relevant and based on a reliable foundation. *Mendez*, 204 S.W.3d at 800.

There is no rigid formula to determine whether a particular witness is qualified to testify as an expert. *Mega Child Care, Inc. v. Tex. Dept. of Protective and Regulatory Servs.*, 29 S.W.3d 303, 310 (Tex. App.—Houston [14th Dist.] 2000, no pet.). There must be a fit between the subject matter and the expert's familiarity with that subject matter. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). "The proponent must establish that the expert has knowledge, skill, experience, training, or education regarding the specific issue before the trial court which would qualify the expert to give an opinion on that particular subject." *Mega Child Care*, 29 S.W.3d at 310. The trial court's determination that these requirements are met is reviewed for abuse of discretion. *Mendez*, 204 S.W.3d at 800. The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. *Id.*

Dr. Alvarez is a licensed psychologist who was appointed by the trial court to conduct a psychological evaluation. She has a doctorate in developmental psychology and a clinical practice in which she works with children and families. A large part of her practice consists of performing psychological and custody evaluations. She has been conducting psychological and custody evaluations for the courts for 11 years. Dr. Alvarez testified that her opinions were based on her experience, training, and knowledge. *See* Tex. R. Evid. 702. Based on the evidence in the record as to her qualifications, we cannot say the trial court abused

its discretion in allowing Dr. Alvarez to testify as an expert in this matter.[2]

B. This Record Supports the Trial Court's Judgment

We review a trial court's determination on managing conservatorship for an abuse of discretion. *In Interest of K.S.*, 492 S.W.3d 419, 426 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). A trial court abuses its discretion when it acts arbitrarily or unreasonably, or when it clearly fails to correctly analyze or apply the law. *Arredondo v. Betancourt*, 383 S.W.3d 730, 734 (Tex. App.—Houston [14th Dist.] 2012, no pet.). In this context, legal sufficiency challenges are not independent grounds of error but instead are factors to be considered in determining whether the trial court abused its discretion. *In Interest of K.S.*, 492 S.W.3d at 426. There is no abuse of discretion as long as there exists some evidence of a substantive and probative character to support the trial court's decision. *Baltzer v. Medina*, 240 S.W.3d 469, 475 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

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[2] Appellant's argument also could be construed as contending that Dr. Alvarez's testimony did not assist the trier of fact in understanding the evidence because her testimony addressed matters within the common knowledge of the trier of fact. *See generally K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) ("When the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony."). While it is unclear what issue Charles contends is within the common knowledge of the trier of fact, we conclude that Dr. Alvarez's testimony was helpful to the trier of fact's understanding of the evidence and resolution of the issues in this case. *See* Tex. R. Evid. 702. Dr. Alvarez opined that Charles was engaged in the alienation of the children from Kimberly. Her testimony provided evidence of Charles's actions with respect to the children and the effect on the children beyond Kimberly's observations as to how the children acted towards her. Dr. Alvarez's testimony covered an appropriate topic for expert testimony under Rule 702 and was relevant to the issues before the trial court in determining whether a modification of the divorce decree was warranted. *Cf. Villarreal v. Villarreal*, 684 S.W.2d 214, 219 (Tex. App.—Corpus Christi 1984, no writ) (concluding there was insufficient evidence that the children were suffering emotional damage because there was no expert testimony on the issue and no sufficient evidence on the issue from any other source). Accordingly, we reject Charles's argument insofar as he suggests that Dr. Alvarez's testimony should have been excluded under Rule 702 because it did not help the trier of fact understand the evidence or determine a fact in issue.

Charles contends the evidence was insufficient to support a "de-facto termination of parental rights," relying on Section 262.201 of the Texas Family Code. This provision relates to procedures in suits by governmental entities to protect the health and safety of a child. *See* Tex. Fam. Code Ann. §§ 262.001-.353 (Vernon 2014 & Supp. 2016). The present case involves a suit for modification of the parent-child relationship tried between two parents, not a suit by a governmental entity. It is governed by Section 156 of the Texas Family Code. *See* Tex. Fam. Code Ann. §§ 156.001-.409 (Vernon 2014 & Supp. 2016).

A child's best interest always is the primary consideration of the court in determining issues of possession and access. *Id*. § 153.002 (Vernon 2014). A trial court may modify the provisions of the divorce decree that provide the terms and conditions of conservatorship or that provide for the possession of or access to a child, if (1) modification would be in the best interest of the child, and (2) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the rendition date of the divorce decree. *See id.* § 156.101(a); *Flowers v. Flowers*, 407 S.W.3d 452, 456 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The court is not confined to rigid or definite guidelines in determining whether a material and substantial change has occurred. *In re A.L.E.*, 279 S.W.3d 424, 428 (Tex. App.—Houston [14th Dist.] 2009, no pet.). "[T]he court's determination is fact-specific and must be made according to the circumstances as they arise." *Id.* Material changes can include "(1) marriage of one of the parties, (2) poisoning of the child's mind by one of the parties, (3) change in the home surroundings, (4) mistreatment of the child by a parent or step-parent, or (5) a parent[] becoming an improper person to exercise custody." *Id.* at 428-29. "Additionally, a course of conduct pursued by a managing conservator that hampers a child's opportunity to favorably associate with the other parent may

suffice as grounds for redesignating managing conservators." *Arrendondo*, 383 S.W.3d at 735.

There is a rebuttable presumption that a standard possession order is in the best interest of a child and provides reasonable minimum possession of a child for a parent named as a joint managing conservator. Tex. Fam. Code Ann. § 153.353 (Vernon 2014). "[A] trial court is permitted to place conditions on a parent's access, such as supervised visitation, if necessary for the child's best interest . . . ." *Hinojosa v. Hinojosa*, No. 14-11-00989-CV, 2013 WL 1437718, at *6 (Tex. App.—Houston [14th Dist.] Apr. 9, 2013, no pet.) (mem. op.); *see also* Tex. Fam. Code Ann. § 153.193 (Vernon 2014) (terms of an order restricting or limiting a parent's right to possession of or access to a child must not exceed those required to protect the best interest of the child). When possession varies from the standard possession order, then on timely written or oral request "the court shall state in the order the specific reasons for the variance from the standard order." Tex. Fam. Code Ann. § 153.258 (Vernon 2014).

Following the proceedings on which this appeal is based, the trial court found "the circumstances of the children, the conservators, or other party affected by the order have materially and substantially changed since the date of the final decree" and "the requested modification is in the best interest of the children." The trial court modified the provisions of the divorce decree related to access to the children. Specifically, Kimberly was given the exclusive right to designate the children's primary residence. Further, Charles's right of access to the children was limited as set out in six steps, which if completed permitted the reinstitution of a standard possession order. The trial court also issued findings pursuant to Texas Family Code Section 153.258. The trial court found that (1) the recommendations of both experts are supported by evidence; (2) Charles engaged in a course of

conduct intended to alienate the minor children from their mother; (3) it was in the best interest of the minor children that they undergo counseling and continued exposure to their mother's home, without interference from their father; and (4) a standard possession order was not in the best interest of the minor children at the time.

Sufficient evidence introduced at trial supports the trial court's decision that Charles had engaged in conduct to alienate the children from Kimberly. The trial court ordered a social study by Carolyn Holley and a psychological evaluation by Dr. Alvarez. Dr. Alvarez opined there was a clear pattern of alienation by Charles and his family. Dr. Alvarez recommended that Charles and Kimberly remain joint managing conservators with Kimberly to establish domicile. She further recommended the boys be given a period of uninterrupted time to reintegrate into Kimberly's home before a standard possession order was instituted. Holley also opined that Charles intentionally deprived the children of having a positive relationship with Kimberly, and that the children were being emotionally damaged. She recommended Kimberly be given the right to designate the children's primary residence.

Dr. Alvarez and Holley testified at the trial, along with Charles; Kimberly; a principal of the children's school; and the superintendent of the children's school. Kimberly testified that the children treated her differently after the divorce and were demeaning to her. The children did not answer her phone calls and Charles was unresponsive when she tried to talk with him about the issue. Further, she testified that Charles did not notify her about the children's activities or when they were sick. Kimberly had to send the divorce decree to the children's school by fax to get information from the children's school because the school was under the mistaken impression that Charles was the sole managing conservator. Kimberly

also testified that Charles prevented her from exercising her visitation with the children.

Dr. Alvarez testified that Charles was engaged in parental alienation and such actions had negatively affected the children's relationship with their mother. Dr. Alvarez also testified that Charles was an obstacle to co-parenting the children. As examples of the alienation, Dr. Alvarez testified the children would call Kimberly by her first name; they were concerned with adult issues; and the oldest child made statements indicating he was aligned with Charles in promoting Charles's agenda and felt responsible for Charles's emotions. Additionally, Dr. Alvarez testified that Charles's parents engaged in a pattern of alienation, including saying derogatory things about Kimberly to the children, and did not consider Kimberly to be the children's mother. Dr. Alvarez observed varying degrees of anxiety in each of the children during her visits, which she attributed to Charles's behavior. Dr. Alvarez testified that she did not observe an intention on Kimberly's part to ruin the relationship between the children and Charles. Dr. Alvarez opined that Charles should have supervised visitation until he completed counseling related to parental alienation. Holley also testified that the children's relationship with Kimberly was being affected negatively by Charles and his parents. Additionally, Holley testified Charles refused to cooperate and work with Kimberly.

The record contains evidence supporting the trial court's finding that Charles was engaged in a course of conduct intended to alienate the minor children from their mother. Additionally, the record contains evidence supporting the trial court's finding of a material and substantial change in circumstances and the modification order being in the best interest of the children. We conclude that at least some evidence of a substantive and probative character exists to support the

trial court's finding of a material and substantial change in circumstances since the previous custody order and the trial court did not abuse its discretion in modifying the final divorce decree. We overrule Charles's first issue. *See In re A.E.A.*, 406 S.W.3d 404, 415 (Tex. App.—Fort Worth 2013, no pet.) (more than a scintilla of evidence existed that father engaged in conduct intended to alienate child from mother which was legally sufficient to support trial court's finding).

III. Ineffective Assistance of Counsel

Charles contends this matter should be reversed because he received ineffective assistance of counsel during the trial. As a general rule, ineffective assistance of counsel claims are limited to criminal cases. *See Cherqui v. Westheimer St. Festival Corp.*, 116 S.W.3d 337, 343-44 (Tex. App.—Houston [14th Dist.] 2003, no pet.). An exception exists for cases involving the termination of parental rights. *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003). The case before us involves child custody incident to a divorce proceeding, not the termination of parental rights. Accordingly, we overrule Charles's second issue. *See Reagins v. Walker*, No. 14-15-00764-CV, 2017 WL 924498, at *5 (Tex. App.—Houston [14th Dist.] Mar. 7, 2017, no pet.); *Blair v. McClinton*, No. 01-11-00701-CV, 2013 WL 3354649, at *3 (Tex. App.—Houston [1st Dist.] July 2, 2013, pet. denied) (mem. op.); *In re G.J.P.*, 314 S.W.3d 217, 223 (Tex. App.—Texarkana 2010, pet. denied).

CONCLUSION

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Jamison, and Brown.