COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00156-CV

IN THE INTEREST OF F.A., A CHILD

FROM THE 324TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 324-555745-14

MEMORANDUM OPINION[1]

Appellant N.A. (Father) appeals from the trial court's order modifying his parental relationship with his daughter, F.A. In two issues, he contends that the trial court abused its discretion, first by appointing Father as possessory conservator but denying him possession and access based on a finding of endangerment, and second by terminating Father's possession and access

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

based on a single witness's uncorroborated testimony and without providing Father any specific guidelines for how he could obtain possession of and access to his daughter in the future. We affirm.

I. Background

In December 2014, the trial court signed an agreed Final Decree of Divorce appointing Father and Appellee N.A. (Mother) as joint managing conservators of the child,[2] with Mother having the right to designate F.A.'s primary residence. The decree also included a possession order with a stair-step schedule that increased Father's periods of possession over time.

The following month, Father filed a petition to modify the parent-child relationship. His supporting affidavit alleged that Mother was not feeding F.A., that Mother and Mother's sister were physically abusing F.A. and were making negative comments about Father in F.A.'s presence, and that Mother was not providing F.A. with clean clothes or clothes that fit. Father asked the trial court to name him as the conservator with the right to designate the child's primary residence, to provide Mother with visitation pursuant to a standard possession order, and to order that Mother's visitation be supervised.

Mother answered, generally denying Father's allegations and asserting that Father's petition was frivolous and harassing. In June 2015, she filed a counterpetition for modification supported by an affidavit stating that Father's

[2]F.A. was four years old when her parents divorced.

girlfriend had reported to Mother and to the police that Father was sexually abusing the child. Mother also filed a safety plan from Child Protective Services in which she agreed that F.A. would not have any contact with Father while CPS investigated sexual-assault allegations against him. Mother asked the trial court to deny Father access to and possession of the child or, in the alternative, order supervised visitation. Mother also requested a temporary restraining order denying Father access to and possession of the child, which the trial court granted.

The case was tried to the bench in January 2016. Father abandoned his request for affirmative relief. He chose not to testify regarding the matters in his affidavit supporting his petition to modify but asked that the trial court review his affidavit.

Father recalled that, in June 2015, the Irving Police Department contacted him regarding allegations that he had sexually abused his daughter. He admitted that his girlfriend reported him to the police. The investigation lasted three or four months; Father understood that the investigation had been "dropped" and knew nothing about any Dallas County investigation or prosecution.

Father denied ever sexually or physically abusing F.A. Father admitted that his girlfriend had confronted him about "red marks" on the child's vagina sometime after he had filed his petition to modify, and said that he took F.A. to the hospital immediately. He maintained that this was the only time his girlfriend confronted him about the child's vagina's being red.

Father also admitted to taking two photographs with his cellphone of his daughter's vagina but claimed that he did so to use as evidence that Mother was not keeping F.A. clean. He also recorded videos to prove that F.A. was not being provided with clean underwear, clothes, and shoes, and to show how she would cry when she had to return to Mother.

Mother testified that, on June 6, 2015, the police called her. After picking up her daughter from the police station, Mother took F.A. to the hospital. At that time, the child had cream in her vagina, which caused Mother concerns about F.A.'s health.

According to Mother, because of the allegations against Father CPS opened an investigation, and Father was denied visitation. Mother also stated that, since the sexual-abuse allegations, F.A.'s behavior had changed: she had become terrified, anxious, sad, and scared. Mother further testified that she was at the police station and the hospital with her daughter when F.A. made statements to the police and to hospital staff, and that she had no reason to doubt F.A.'s truthfulness.[3]

Another prosecution witness was G.M., who had been Father's girlfriend for about a year. She broke up with him after she "saw something strange with his daughter"; "[b]ecause of what I had seen and what I had heard[,] I couldn't be with a man like that." G.M. was with Father every time he had visitation with

[3]The record does not reveal what F.A. said.

F.A., and according to G.M., Father did not make the child wear underwear. G.M. also observed Father and F.A. engaging in play that involved F.A.'s lifting up her dress and sitting on Father with "her vagina on his face." Father did nothing but laugh. When G.M. confronted Father about this behavior, he simply stopped letting G.M. spend the night during his periods of possession.

G.M. further testified that, on two occasions about two weeks apart, she noticed that F.A.'s vagina was red. The first time, the redness looked like a rash, and she and Father took the child to the hospital. On the second occasion, the redness was not a rash. G.M. wanted Father to go to the police, but he refused, so she went to the police on her own. G.M. testified that she had concerns for the child's safety with Father.

G.M. also testified that Father had about 20 photographs on his cellphone of his daughter with her legs spread and vagina exposed. The child's vagina was not red in any of those photographs. Although Father told G.M. that he needed the photographs to use as proof in court, he had no explanation for why F.A.'s vagina was not red in the photographs or for why he had so many photographs.

Roughly three weeks after the January 2016 bench trial, the trial court signed an order removing Mother and Father as joint managing conservators of the child, appointing Mother as sole managing conservator, and appointing Father as possessory conservator. The trial court found the evidence credible that Father has a history or pattern of sexual abuse against F.A. and further found that awarding him access to F.A. would "endanger [her] physical health or

emotional welfare and would not be in the best interest of the child." Based on this finding, the trial court ordered that Father's "previously ordered possession of and access to the child be abated and terminated" and that he "have no access to or possession of" F.A.

II. Standard of Review

The Texas Family Code authorizes a trial court to modify conservatorship and possession and access if the modification is in the child's best interest and if the circumstances of the child, conservator, or other party affected by the existing order have materially and substantially changed since the initial order was rendered. Tex. Fam. Code Ann. § 156.101(a)(1) (West 2014). Where, as here, no findings of fact or conclusions of law are filed, the trial court's judgment implies all factual findings necessary to support it. *Rosemond v. Al-Lahiq*, 331 S.W.3d 764, 766–67 (Tex. 2011); *Wood v. Tex. Dep't of Pub. Safety*, 331 S.W.3d 78, 79 (Tex. App.—Fort Worth 2010, no pet.). Where a reporter's record is filed, however, these implied findings are not conclusive, and an appellant may challenge them by raising both the legal and factual sufficiency of the evidence. *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003); *Liberty Mut. Ins. Co. v. Burk*, 295 S.W.3d 771, 777 (Tex. App.—Fort Worth 2009, no pet.). If such evidentiary issues are raised, we apply the same standard of review as in the review of jury findings or a trial court's findings of fact. *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989); *Liberty Mut. Ins. Co.*, 295 S.W.3d at 777. We must affirm if the judgment can be upheld on any

legal theory that finds support in the record. *Rosemond*, 331 S.W.3d at 767; *see also Liberty Mut. Ins. Co.*, 295 S.W.3d at 777.

We review a trial court's decision to modify an order regarding conservatorship or the terms of possession of and access to a child under an abuse-of-discretion standard. *In re H.D.C.*, 474 S.W.3d 758, 763 (Tex. App.—Houston [14th Dist.] 2014, no pet.). A trial court abuses its discretion if it acts arbitrarily and unreasonably or without reference to guiding principles. *Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011); *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). A trial court also abuses its discretion if it does not analyze or apply the law properly. *Iliff*, 339 S.W.3d at 78. Legal and factual sufficiency are not independent grounds of error in modification cases, but they are relevant factors in deciding whether the trial court abused its discretion. *In re T.D.C.*, 91 S.W.3d 865, 872 (Tex. App.—Fort Worth 2002, pet. denied) (op. on reh'g).

In applying the abuse-of-discretion standard to a trial court's decision to modify earlier provisions related to possession and custody of children, we ask first whether the trial court had sufficient information on which to exercise its discretion, applying a traditional sufficiency review; and if so, whether it acted reasonably in applying that discretion. *Blackwell v. Humble*, 241 S.W.3d 707, 715 (Tex. App.—Austin 2007, no pet.). If some evidence of a substantive and probative character exists to support the trial court's modification decision, there is no abuse of discretion. *In re M.A.M.*, 346 S.W.3d 10, 14 (Tex. App.—Dallas 2011, pet. denied).

III. Analysis

A. Did the trial court abuse its discretion by denying Father possession of and access to the child?

In his first issue, Father argues that the trial court abused its discretion by appointing him possessory conservator but denying him possession of and access to the child based on an endangerment finding. Father argues in part of his second issue that the trial court abused its discretion by denying Father possession and access based on G.M.'s testimony because that testimony did not rise to the level of clear and convincing evidence that Father's possession and access should be terminated. We address these arguments together because they are intertwined.

The burden of proof in conservatorship cases is a preponderance of the evidence. *See* Tex. Fam. Code Ann. § 105.005 (West 2014); *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). This differs from the burden in termination proceedings, which is clear and convincing evidence. Tex. Fam. Code Ann. § 161.001(b). (West Supp. 2016); *see J.A.J.*, 243 S.W.3d at 616 (contrasting the quantum of proof required to support termination from that required to support a conservatorship decision). Father urges us to apply the clear-and-convincing standard here, but his parental rights were not terminated, and the family code allows him to seek modification of the order from which he appeals. *See* Tex. Fam. Code Ann. § 102.003(a)(1) (West Supp. 2016), §§ 156.001–.002, 156.101 (West 2014); *In re Stearns*, No. 02-14-00079-CV, 2014 WL 1510059, at

*2 (Tex. App.—Fort Worth Apr. 17, 2014, orig. proceeding [mand. denied]) (mem. op.) ("It is this law that differentiates Father from parents whose relationships with their children have been permanently severed, and it is this law that provides Father and other similarly situated parents due process."). We will thus review the trial court's judgment under the preponderance-of-the-evidence standard.

Father does not argue that the modification was improper under chapter 156 of the family code but looks instead to chapter 153 to support his arguments. *See* Tex. Fam. Code Ann. §§ 153.001–.709 (West 2014 & Supp. 2016) ("Conservatorship, Possession, and Access"), §§ 156.001–.410 (West 2014 & Supp. 2016) ("Modification"). Father asserts that the trial court's appointing him possessory conservator conflicts with its finding that access would endanger his daughter's physical health and emotional welfare. *See id.* § 153.191 ("The court shall appoint as a possessory conservator a parent who is not appointed as a sole or joint managing 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."). He further contends that Texas appellate courts interpreting family code sections 153.191 and 153.193 "have consistently held that a trial court abuses its discretion when it simultaneously appoints a person a possessory conservator of a child and then denies that parent all possession and access out of fear of endangering the safety and welfare of the child." *See id*. § 153.191 ("Presumption that Parent to be Appointed Possessory Conservator"), § 153.193 ("Minimal Restriction on

Parent's Possession or Access"); *In re Walters*, 39 S.W.3d 280, 285–87 (Tex. App.—Texarkana 2001, no pet.); *Roosth v. Roosth*, 889 S.W.2d 445, 451–52 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

Mother counters that sections 153.191 and 153.193 do not apply because that family-code chapter does not apply to modification proceedings. *See In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000) (holding that parental presumption in section 153.131 does not apply in a chapter 156 modification proceeding); *In re P.D.M.*, 117 S.W.3d 453, 455–56, 457–58 (Tex. App.—Fort Worth 2003, no pet.) (stating that chapter 153 governs initial child conservatorship, possession, and access issues, while chapter 156 governs suits attempting to effect a custodial change following the entry of an initial custody order, and citing *V.L.K.* in holding that section 153.131's parental presumption does not apply to any subsequent proceeding regardless of the parties involved); *see also In re S.E.K.*, 294 S.W.3d 926, 928–29 (Tex. App.—Dallas 2009, pet. denied) (concluding trial court is not required to make findings regarding family violence in a modification because presumption against naming parent with history of domestic violence as sole managing conservator in section 153.004(b) does not apply in modification proceeding). *But see In re L.C.L.*, 396 S.W.3d 712, 719–20 (Tex. App.—Dallas 2013, no pet.) (applying section 153.004(c), (d), (d-1) and analyzing evidence of family violence in a suit to modify possession and access).

Mother also argues that even if chapter 153 does apply to modification proceedings, the trial court did not abuse its discretion by denying Father

possession and access because it was required to do so under section 153.004. Mother further points out that the cases on which Father relies—*Roosth* and *Walters*—involved initial determinations of conservatorship, possession, and access and did not involve section 153.004, and, moreover, that *Roosth* was decided under prior versions of sections 153.191 and 153.193. According to Mother, then, these cases are not controlling.

Assuming that chapter 153 applies to modification proceedings, for either of two reasons the trial court did not abuse its discretion. First, section 153.191 requires a trial court to appoint a parent as possessory conservator unless it finds that both (1) the appointment is not in the child's best interest and (2) parental possession or access would endanger the child's physical or emotional welfare. Tex. Fam. Code Ann. § 153.191. Here, the trial court found only the latter. The trial court's continued *appointment* of Father as possessory conservator thus does not conflict with its simultaneous finding that Father's *access* would endanger F.A.'s physical health or emotional welfare.

Second, section 153.004(c) requires a trial court to "consider the commission of family violence or sexual abuse in determining whether to deny, restrict, or limit the possession of a child by a parent who [like Father here] is appointed as a possessory conservator." *See* Tex. Fam. Code Ann. § 153.004(c). A trial court "may not allow" a parent to have access to a child when a preponderance of the evidence shows a history or pattern of family violence during the pendency of the suit, unless the trial court (1) finds that

awarding the parent access would not endanger the child's physical health or emotional welfare and would be in the child's best interest and (2) renders a possession order that is designed to protect the child's safety and well-being (or that of any other person who has been a victim of that parent's family violence). *Id.* § 153.004(d), (d-1). Under the family code's statutory scheme, "family violence" includes "abuse," which is defined by section 261.001(1)(E) to mean:

> sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of continuous sexual abuse of young child or children under Section 21.02, Penal Code, indecency with a child under Section 21.11, Penal Code, sexual assault under Section 22.011, Penal Code, or aggravated sexual assault under Section 22.021, Penal Code.

Id. § 261.001(1)(E) (West Supp. 2016); *see id.* § 71.004(2) (West Supp. 2016), § 101.0125 (West 2014).

Here, viewing the evidence in the light most favorable to the trial court's judgment and implying all findings necessary to support that judgment, we conclude that the preponderance of the evidence sufficed to show that Father had engaged in sexual conduct, including conduct that constituted indecency with a child under penal code section 21.11. *See* Tex. Penal Code Ann. §§ 21.11(a)(1), (a)(2)(B), (c)(1) (West 2011).

Father counters that the penal-code sections listed in section 261.001(1)(E) "mandate some form of force or use of force or threat to create sexual contact" and that he showed no signs of arousal. But use of force or threat is not an element of the offense under section 21.011. *See id.* And the

intent-to-arouse-or-gratify-the-sexual-desire element can be inferred from a defendant's conduct, a defendant's remarks, and all surrounding circumstances. *See, e.g.*, *Bazanes v. State*, 310 S.W.3d 32, 40 (Tex. App.—Fort Worth 2010, pet. ref'd) (citing *McKenzie v. State*, 617 S.W.2d 211, 216 (Tex. Crim. App. [Panel Op.] 1981); *Connell v. State*, 233 S.W.3d 460, 467 (Tex. App.—Fort Worth 2007, no pet.) (mem. op.)). Here, Father merely laughed when F.A. sat on his face with "her vagina on his face." When G.M. confronted Father about this behavior, he stopped letting her spend the night during the times he had possession of his daughter. Additionally, he had about 20 photographs on his cellphone with his daughter's legs spread and vagina exposed. Even though Father told G.M. that he needed these photographs to use as proof in court of Mother's ostensible negligence, he could not explain why F.A.'s vagina was not red in the photographs or why he had so many. We conclude that Father's conduct and the surrounding circumstances sufficed to show by a preponderance of the evidence that he possessed the intent to arouse or gratify his sexual desire when engaging in the alleged conduct.

We must affirm a judgment if it can be upheld on any legal theory that finds record support. Section 153.004(d) prohibits a trial court from allowing a parent—even one who has been appointed possessory conservator—to have access to a child when a preponderance of the evidence shows a history or pattern of family violence. Tex. Fam. Code Ann. § 153.004(d). Although section 153.004(d-1) contemplates exceptions to this denial of access, a trial court must

find that awarding such access would not endanger the child's physical health or emotional welfare and that the access would be in the child's best interest. *See id.* § 153.004(d-1)(1). The trial court here made no such findings. Thus, assuming chapter 153 applies to modification proceedings, we conclude that the trial court did not abuse its discretion by denying Father possession of and access to F.A. *See id.*; *L.C.L.*, 396 S.W.3d at 719–20 (applying section 153.004(c), (d), (d-1) in a suit to modify possession and access).

But even if we confine our analysis to chapter 156's modification procedures, we still conclude that the trial court did not abuse its discretion. For one thing, modification requires some material and substantial change in circumstances, yet Father does not contend that no such change existed. *See* Tex. Fam. Code Ann. § 156.101(a)(1). We will liberally construe Father's appellate arguments as challenging the trial court's determination that denying him possession and access was in the child's best interest.

Chapter 156 contains no provisions restricting a trial court's ability to deny a parent possession and access. *Compare id.* §§ 156.001–.410, *with id.* §§ 153.004, 153.193 ("The terms of an order that denies possession of a child to a parent or imposes restrictions or limitations on a parent's right to possession of or access to a child may not exceed those that are required to protect the best interest of the child."). A court's primary consideration in determining the issue of

possession and access must always be the child's best interest. *Id.* § 153.002;[4] *J.A.J.*, 243 S.W.3d at 614. Courts may use a nonexhaustive list of factors to determine the child's best interest. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *T.D.C.*, 91 S.W.3d at 873. Those factors include—

- the child's desires;
- the child's emotional and physical needs, now and in the future;
- the emotional and physical danger to the child now and in the future;
- the parental abilities of the individuals seeking custody;
- the programs available to assist these individuals to promote the child's best interest;
- the plans for the child by these individuals or by the agency seeking custody;
- the stability of the home or proposed placement;

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[4]In *Lenz v. Lenz*, the supreme court used section 153.001(a) of the family code as a framework for reviewing a best-interest finding in connection with modifying a relocation provision. 79 S.W.3d 10, 14–19 (Tex. 2002); *see In re A.S.M.*, 172 S.W.3d 710, 715 (Tex. App.—Fort Worth 2005, no pet.). Section 153.001(a) provides that the public policy of our 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.

Tex. Fam. Code Ann. § 153.001(a).

- the parent's acts or omissions indicating that the existing parent-child relationship is not a proper one; and
- any excuse for the parent's acts or omissions.

Holley, 544 S.W.2d at 371–72 (citations omitted). Other factors to consider in modification suits include the child's stability and the need to prevent constant litigation in child-custody cases. *V.L.K.*, 24 S.W.3d at 343.

"[E]vidence of sexual abuse or family violence must be considered in determining the best interest of the children in a modification proceeding." *S.E.K.*, 294 S.W.3d at 929. Moreover, "the trial judge 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 P.M.G.*, 405 S.W.3d 406, 410 (Tex. App.—Texarkana 2013, no pet.) (quoting *In re A.L.E.*, 279 S.W.3d 424, 427 (Tex. App.—Houston [14th Dist.] 2009, no pet.)). We "defer to the trial court's judgment in matters involving factual resolutions and any credibility determinations that may have affected those resolutions." *Id.* (citing *George v. Jeppeson*, 238 S.W.3d 463, 468 (Tex. App.—Houston [1st Dist.] 2007, no pet.)). Thus, we conclude that based on the evidence here, we cannot say the trial court abused its discretion by concluding that F.A's best interest would be served by denying Father possession and access.

Accordingly, we overrule Father's first issue and the portion of his second issue challenging the sufficiency of the evidence.

B. Did the trial court abuse its discretion by not providing Father guidance as to how to regain possession and access?

In the remaining portion of his second issue, Father argues that the trial court abused its discretion by terminating his possession and access without specifying how he might obtain possession and access to his daughter in the future. Father has not cited anything that requires a trial court to provide such guidance. Chapter 156 of the family code governs modifications and provides Father a sufficient roadmap for seeking modification of the order in the future. *See* Tex. Fam. Code Ann. §§ 102.003(a)(1), 156.001–.002, 156.101. We therefore cannot say the trial court abused its discretion, and we overrule the remaining portion of Father's second issue.

IV. Conclusion

Having overruled both of Father's issues, we affirm the trial court's order.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: GABRIEL and KERR, JJ.; and KERRY FITZGERALD (Senior Justice, Retired, Sitting by Assignment).

DELIVERED: February 16, 2017