AFFIRMED; Opinion Filed April 9, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00285-CV

IN THE INTEREST OF C.F.M. AND B.C.M., CHILDREN

On Appeal from the 255th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-09-02559

MEMORANDUM OPINION

Before Justices Lang-Miers, Myers, and Boatright
Opinion by Justice Myers

In this suit for divorce and child custody, Father appeals the trial court's judgment in favor of Mother. After the jury trial, the court appointed Mother sole managing conservator and Father possessory conservator of the children, C.F.M. and B.C.M. Father brings five issues on appeal contending the trial court erred by (1) excluding the testimony of Father's treating psychologist; (2) admitting evidence of Father's prior misconduct and criminal allegations made against him; (3) admitting judicial orders that usurped the jury's role on the issues of custody, characterization of property, and fraud; (4) excluding the plan of reorganization presented by Mother and the bankruptcy trustee in Father's bankruptcy case when the plan contained statements about the characterization of marital property; and (5) permitting the amicus attorney to testify. We overrule appellant's issues and affirm the trial court's judgment.

BACKGROUND

Father and Mother married in 2004. They were both originally from Kansas City. Father had lived in Dallas since attending Southern Methodist University in 1984, and Mother lived in Kansas City before they married. They agreed to live in Dallas after they married. They had two daughters, C. and B., aged nine and seven years old respectively at the time of trial.

In December 2008, the family traveled from Dallas to Kansas City to see their families at Christmas. Father returned to Dallas on December 30, but Mother and the children remained in Kansas City. Mother told Father that she and the children would remain in Kansas City to help Mother's and Father's parents, who were having surgeries and had other health issues. When Mother and the children did not return to Dallas by early February 2009, Father filed for divorce on February 12, 2009. Mother and the children returned to Dallas in March.

In temporary pre-trial orders, the trial court appointed Mother and Father temporary joint managing conservators, with Mother having the exclusive right to designate the children's primary residence. In December 2009, the older daughter, then four years old, made an outcry indicating sexual abuse by Father. On December 29, 2009, the trial court suspended Father's possession of the children until supervised possession could be arranged. On June 1, 2010, the court made Mother temporary sole managing conservator and Father possessory conservator of the children. The court ordered that Father's possession of the children be supervised. The child later stated the sexual abuse by Father never occurred, but the trial court did not lift the requirement that Father's possession of the children be supervised.

Father did not regularly attend the supervised possession. He would attend consistently for a few weeks and then not show up for weeks or months. His doctors, lawyers, and the amicus attorney all told him he needed to attend the supervised possession regularly, but he did not do so. He explained that the supervised possession was hard on the children. However, the doctors and

the possession supervisors testified the children were not affected by the possession being supervised. Father last attended supervised possession of the children on July 5, 2012, meaning that by the time of the trial in October and November 2014, he had gone over two years without seeing the children as provided by the court orders.

Much of the testimony concerned Father's fitness to be a managing conservator of the children. In 2011, he was hospitalized in a mental-health facility after an incident at a law office where he was screaming and slamming papers and then, later that day, stepped out of a car into traffic. Doctors testified he had a narcissistic personality disorder with antisocial traits, and much evidence was admitted of Father's actions demonstrating his narcissism and antisocial behavior.

Evidence was also admitted showing Father's failure to follow court orders. Despite the court's orders that Father not see the children unless supervised, he attended, unsupervised, one of C.'s baseball games, and he went to a golf tournament where C. was playing and played a few holes of golf with her. Father also failed to follow many of the court's orders in discovery. As a result, the court banned Father from designating and calling to testify certain witnesses as well as imposing other evidentiary restrictions as discovery sanctions. The trial court twice ordered Father jailed for contempt of court for failing to follow court orders and injunctions, but those contempt orders were set aside by this Court when Father petitioned for writ of habeas corpus.

At the end of the jury trial, the jury found Mother should be managing conservator, all the property submitted to the jury for characterization was community property, Father committed fraud with respect to Mother's community-property rights, and the damages from the fraud was approximately $1.1 million. The court determined that Father should be a possessory conservator of the children and that his possession of the children should be supervised.

EXCLUSION OF DR. PRICE'S TESTIMONY

In his first issue, appellant contends the trial court erred by excluding the testimony of Dr. Lynn Price. We review a trial court's order excluding a witness's testimony for abuse of discretion. *See Gunn v. Fuqua*, 397 S.W.3d 358, 373 (Tex. App.—Dallas 2013, pet. denied) (exclusion of expert witnesses); *White v. Harrison*, 390 S.W.3d 666, 676 (Tex. App.—Dallas 2012, no pet.) (exclusion of fact witness). The trial court abuses its discretion when it acts "without reference to any guiding rules and principles." *Starwood Mgmt., LLC v. Swaim*, 530 S.W.3d 673, 678 (Tex. 2017) (quoting *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

Dr. Price is a clinical psychologist and was Father's therapist and forensic evaluator. In a pretrial order signed August 1, 2014, about three months before trial, the trial court ordered that Father was barred, as a discovery sanction, from calling Dr. Price as either a fact or expert witness. At a pretrial hearing two weeks before trial, the court reiterated that Father could not "designate" Dr. Price.

On appeal, Father argues the trial court erred by excluding Dr. Price on other grounds argued by Mother, including that Dr. Price's testimony would violate psychologists' ethical principles because she was both his therapist and forensic evaluator. Father's arguments address only briefly whether exclusion of Dr. Price as a discovery sanction was appropriate. Father cited *In re P.M.B.*, 2 S.W.3d 618 (Tex. App.—Houston [14th Dist.] 1999, no pet.), which stated:

> [I]n determining issues regarding the conservatorship of, possession of, and access to a child, the court's primary consideration is always the best interest of the child. Compared to the best interest of the child, technical rules of pleading and practice are of little importance in determining child custody issues. This is also true with regard to rule 215 discovery sanctions. Moreover, courts have recognized that the exclusion of essential evidence, like the striking of pleadings, can equate to a death penalty sanction, and should not be used without considering whether lesser sanctions are adequate to accomplish the needed compliance, deterrence and punishment.
>
> We believe that the best interest of a child can only be attained when a court's decision is as well-informed as the circumstances allow. A decision on custody,

> possession, or access can rarely be well-informed without consideration of the evidence and perspectives of both parents. Because the exclusion of any important evidence as a discovery sanction can only produce a less-informed decision, contrary to the best interest of the child, we believe that it should be resorted to only where lesser sanctions are either impracticable or have been attempted and proven unsuccessful.

Id. at 624–25 (citations omitted). In this case, the trial court's order excluding Dr. Price contained the following findings:

> that Father "is personally responsible for repeatedly and willfully ignoring the Court's Orders with regard to discovery";
>
> "that the imposition of sanctions is necessary to remedy the prejudices incurred by [Mother] and that the sanctions imposed by this Court . . . are premised on the continued, ongoing, and repeated refusal of [Father] to comply wholly with the Court's Orders and the discovery process herein";
>
> "that there is a direct relationship between [Father's] conduct and the imposition of a sanction precluding him from designating any additional experts who have not previously been designated";
>
> "that such sanction is necessary so the [Mother] is able to prepare for trial without the concern of expert after expert being substituted herein";
>
> "that the severity of the sanction is equivalent to or less than the results caused by the prohibited conduct of [Father]";
>
> "that the lesser sanctions previously imposed upon [Father] have not remedied his ongoing behavior";
>
> "that [Father's] assertions and reasoning for the need to designate additional expert witnesses is without merit"; and
>
> "that [Father] has exhibited bad faith and callous disregard of discovery obligations."

Father does not argue on appeal that any of these findings are unsupported by the record or are otherwise improper. The trial court's findings demonstrate that this is a case where exclusion of evidence as a discovery sanction is appropriate because lesser sanctions "have been attempted and proven unsuccessful." *Id.* at 625.

We conclude Father has not shown the trial court erred by excluding Dr. Price's testimony. We overrule Father's first issue.

ADMISSION OF FATHER'S PRIOR BAD ACTS

In his second issue, Father contends the trial court erred by admitting "a slew of allegations and instances of distant misconduct and criminal allegations to attack Father's character and fitness as a parent, when these instances were not criminal convictions, were unproven and often dismissed, and were remote in time."

To preserve error, a party must make a timely request, objection, or motion stating the grounds for the ruling sought and obtain a ruling on the request, objection, or motion or object to the trial court's failure to rule. *See* TEX. R. APP. P. 33.1(a). Also, unless a party obtains a running objection, the party must object each time the evidence is presented or risk waiver of potential error. *Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 235 (Tex. 2007); *In re A.M.*, 418 S.W.3d 830, 841 (Tex. App.—Dallas 2013, no pet.).

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probative than it would be without the evidence; and (b) the fact is of consequence in determining the action." TEX. R. EVID. 401. "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." EVID. 404(a)(1). "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." EVID. 404(b)(1). "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." EVID. 404(b)(2).

"Assaulting a girl at SMU"

Father first complains, "The jury was permitted to hear that [Father] was accused of assaulting a girl at SMU his freshman year, without substantiation, which was 25 years ago." The testimony about which Father complains on appeal is the following:

Q. Now, before this divorce was even filed, you had trouble with rules and laws, did you not?

A. I follow rules, sometimes I don't. No, I have made some mistakes.

Q. Well, let's go backwards. You testified earlier you went to SMU?

A. Yes, I did.

Q. You got kicked out of SMU, didn't you?

A. I was suspended for a semester.

Q. And you were kicked out of SMU for attacking a sorority girl?

[Father's attorney]: Judge, I'm going to object on the grounds of relevance.

[Father]: Absolute biggest lie.

[Trial court admonishes Father for speaking when an attorney has risen to object.]

The Court: I am sorry, what was your objection?

[Father's attorney]: Objection, relevance, Your Honor. It's too remote in time. He was in college.

[Mother's attorney argues Father opened the door to the evidence.]

The Court: The objection is overruled.

[Mother's attorney]: [Father], you were kicked out of SMU for a semester for attacking a sorority girl, correct?

A. Absolute lie. I never touched a sorority girl.

Q. What do you believe you got kicked out of school for a semester for?

A. Being over in the girl's dorms when I was a freshman several times.

Q. And they kicked you out of school for that?

A. Yes.

This testimony contains no evidence that Father was accused of attacking a girl at SMU his freshman year. The only person in this portion of the record who said Father attacked someone at SMU was Mother's attorney, who made the statement in the form of a question. Father denied the allegation. The questions asked by attorneys are not evidence. *See Madden v. State*, 242 S.W.3d

504, 515 n.30 (Tex. Crim. App. 2007); *Verret v. Am. Biltrite, Inc.*, No. 2-04-244-CV, 2006 WL 2507318, at *6 n.5 (Tex. App.—Fort Worth Aug. 31, 2006, pet. denied) (mem. op.). Father did not object to Mother's attorney asking the question on the ground that it had no basis in fact and was unfairly prejudicial.

To the extent Father may also be complaining about the evidence that he was suspended for a semester for multiple violations of the university's rules against men being in the women's dormitories, Father did not object to that questioning, and the same facts came into evidence at other times during the trial without objection. Therefore, Father's complaints on appeal were not preserved in the trial court.

Criminal Fraud

Father also complains about the admission of evidence that he was arrested and charged with criminal fraud, citing to the following testimony:

> Q. [By Mother's attorney] Now, you have also been arrested for fraud, right?
>
> A. In 2000, that's correct.
>
> . . . .
>
> Q. I hand you what's been marked as Respondent's Exhibit No. 38.
>
> [Mother's attorney]: Your Honor, this is a public record that I have a certified copy of, and I would offer Respondent's Exhibit 38.
>
> [Father's attorney]: Judge, relevance. Under Texas Rules of Evidence I don't think this document is relevant to the proceeding. . . . Judge, my only question, I am not sure of the disposition of this document. If I can have the disposition of it, I think it's on page Bates Stamp 190, and all I see is plea of not guilty, charge dismissed. So my objection is this is not admissible under the Texas Rules of Evidence. An underlying complaint or charge is not admissible itself.
>
> [Mother's attorney]: Your Honor, give me just a moment. I will find where it is on here. Your Honor, I will keep moving and we will come back to this.
>
> The Court: Alright.
>
> Q. (By [Mother's attorney) Now, this arrest for fraud, we will go over the document later, was because you switched tags on a shirt in a department store, correct?

> [Father's attorney]: Objection, Judge, relevance. An underlying charge is not admissible in and of itself.
>
> [Mother's attorney]: Your Honor, this goes to his character. He's represented to the jury that he had no problems, he's not above the law, he didn't have any difficulties until this divorce was filed and he was accused of sexual abuse.
>
> [Father's attorney]: Being charged with a crime in and of itself is not relevant pursuant to the Texas Rules of Evidence. It's specifically barred.
>
> The Court: The objection is overruled.
>
> Q. (By [Mother's attorney]) Is that what happened, [Father]?
>
> A. Please repeat your question.
>
> Q. Did you switch tags on a shirt in a department store?
>
> A. Yes, I did.
>
> Q. And did you do that because you thought the shirts were almost the same?
>
> A. Yes, it was a horrible, horrible mistake.

This testimony shows Father admitted without objection that he was arrested for fraud in 2000. Father's attorney objected to Respondent's Exhibit 38, which may have been a charging instrument, and that exhibit was not admitted into evidence. Father was then asked whether the arrest for fraud resulted from him switching the price tags on two shirts. Father's attorney objected to this question on the ground that it was irrelevant because the underlying charge was not relevant.

This testimony contains no evidence that Father was charged with a crime from these events. Respondent's Exhibit 38 was not admitted,[1] and Father was never asked in this part of the testimony if he was charged with a crime. Father does not cite to any other portion of the record where evidence was admitted that he was charged with a crime for these events. Therefore, the objection at trial to the testimony that Father switched the price tags—that being charged with a crime is not relevant—did not apply to Mother's attorney's actual question about the events

[1] Father argues in his brief, "The Court even admitted the dismissed criminal charges from 2000—14 years prior to trial." However, Father does not cite to where the court admitted the exhibit. The index of the reporter's record indicates the exhibit was offered but does not show it was admitted, and the exhibit does not appear to be in the appellate record.

leading to Father's arrest because no evidence shows he was charged. His testimony that he switched the price tags was relevant to the issues of his narcissistic and antisocial tendencies and whether he had those tendencies before the trial court ordered his possession of the children be supervised. We conclude Father has not shown the trial court erred by overruling his objections to the relevance of the questions.

911 Call

Father also complains about the admission of "a 911 transcript complaining of a disturbance for which no charges were filed—rank hearsay." The 911 call was from a person at the office of Father's attorney calling about Father exhibiting rage. The caller told the 911 dispatcher:

> I work at a law firm and we have a client that is out of control, and he's been screaming, yelling, and slamming things, and yelling threatening things about other people that are not in the office. We had one of our male attorneys come up and hover around and this is the calmest the guy's been for the longest period of time. But we would like to report something because if he leaves here and goes and hurts somebody, we don't want to be held liable for that.

When Mother's attorney offered the recording of the 911 call into evidence and asked to play it for the jury, Father's attorney objected "on the grounds of hearsay." Mother's attorney stated, "It's not hearsay, it's a public record." The trial court overruled the objection, and the recording was played for the jury. The recording was attached to an affidavit of the custodian of records for the Dallas Police 9-1-1 Communications Center and states, "After researching our data system, the following CD has a true and accurate recording of a 9-1-1 call that was received on the 29th of day March 2011." The affidavit states the recording was "the product of an Open Records Request."

On appeal, Father does not cite authority or present argument to support his conclusion that the recording was "rank hearsay," nor does he explain why the recording was not admissible under the public-records exception to the rule against hearsay. *See* EVID. 803(8). We conclude Father has not shown the trial court abused its discretion by overruling the hearsay objection.

Hoag Judgment

Father also complains about the admission of evidence about a judgment against him in a suit brought by the Hoags (called "the Hogues" in the reporter's record). That judgment was reversed on appeal. Father asserts his testimony about the judgment was not relevant because the judgment was reversed on appeal. The record shows the following testimony related to this issue:

> Q. . . . Now, you later claim that you couldn't pay your child support because your money was frozen?
>
> A. Correct.
>
> Q. . . .The underlying cause of what you claim froze your accounts is you were sued by some people called the Hogues, right?
>
> A. Correct.
>
> Q. And did they sue you for fraud?
>
> A. I don't recall what their claim was. I got a reversal in appeal court, but I don't recall what their claim was.
>
> Q. And the Hogues obtained a judgment against you, correct?
>
> A. My attorney did not show up, that's correct.
>
> Q. So that was your attorney's fault?
>
> A. Correct. . . .
>
> Q. . . .The Hogues got a judgment against you for approximately $300,000, right?
>
> [Father's attorney]: Objection, Judge, hearsay and best evidence of that will be underlying judgment if it was obtained. If it was reversed on appeal, I think it's not relevant at this time.
>
> [Mother's attorney]: Your Honor, it's very relevant. He's claiming that's why he didn't pay his child support.
>
> [Father's attorney]: Judge, if it was reversed on appeal, it's not relevant.
>
> . . . .
>
> [Amicus attorney]: Judge, on this particular issue I have some recollection. My understanding is [Father] was saying I cannot pay child support because of this judgment. I think it's relevant to show what the amount of the judgment was compared to his other assets.

The Court: The objection is overruled. . . .

Q. (By [Mother's attorney]) Was the judgment against you approximately $300,000?

A. Yes, I believe it was more than that.

Q. It was 300-and-something thousand dollars?

A. Correct.

Q. That was in what year?

A. I don't know when judgment was rendered because my attorney didn't tell me, but everything froze up in February of 2009.

Q. So in 2009 you have a judgment for 300-and-something thousand dollars, right?

A. Correct.

Q. And we know from your earlier testimony that you were making several million dollars a year at that point in time, correct?

A. I don't know what I made that year.

Q. . . . In 2009, when this all happened, February 2009, you made $800,000 that year, right?

A. At the end of the year, yes, that's correct.

Q. And the year before you made almost $1.9 million, right?

A. Correct.

Q. And the year before that you made $3.1 million?

A. Correct.

. . . .

Q. And you were unable to pay your child support?

A. Because all the accounts were frozen.

Father cites no authority in support of his assertion that a civil judgment that was reversed on appeal can never be relevant. In this case, the trial court could reasonably conclude the judgment for $300,000 was relevant as defined in Rule of Evidence 401. As Mother's attorney and the amicus attorney pointed out, Father missed some of his court-ordered child-support payments, and

his assertion that he was unable to pay because of the freezing of his assets following this judgment was relevant to the issue of Father's failure to follow court orders. We conclude Father has failed to show the trial court abused its discretion by overruling his relevance objection.

Suit for "Fraud and Other Claims"

Father also complains of the admission of evidence of a lawsuit in which "[h]e was accused of fraud and other claims that were dismissed." The suit was filed by LandAmerica American Title Company. Father cites to the following testimony concerning this evidence:

> Q. Now, you have had other lawsuits filed against you as well, have you not?
>
> A. I have the Hogue lawsuit.
>
> Q. The Lawson lawsuit?
>
> A. Lawson, yes. . . .
>
> Q. . . . There is a LandAmerica lawsuit.
>
> A. No, that was never filed against me.
>
> [Father's attorney]: Judge, same objection. Texas Rules of Evidence 404, 405, we need a disposition on the actual lawsuit. Just because a lawsuit is filed is not relevant.
>
> [Mother's attorney]: At this point, Your Honor, I would like to impeach him. He just said it didn't happen and I have got the lawsuit in my hand.
>
> A. It never happened.
>
> The Court: Did you just say it never happened, sir?
>
> The Witness [Father]: That is correct.
>
> The Court: The objection is overruled.
>
> Q. (By [Mother's attorney]: [Father], I am going to hand you what is marked as Respondent's Exhibit 43. Your Honor, this is an official copy from the 160th Judicial District Court, . . . filed on April 29, 2008. Offer Respondent's 43.
>
> [Father's attorney]: It's not Lawson.
>
> [Mother's attorney]: No, this is LandAmerica that he said never happened.
>
> The Witness: Right it was dismissed instantly. It was never filed.

[Mother's attorney]: He testified Lawson did happen. He said LandAmerica did not. This is LandAmerica.

The Witness: Correct.

[Father's attorney]: Judge, the lawsuit was dismissed. Objection, relevance.

The Court: You are just using it for impeachment purposes?

[Mother's attorney]: At this point, yes.

. . . .

The Court: The objection is overruled and Respondent's 43 is admitted.

Q. (By [Mother's attorney]) [Father], do you see the top of the page?

A. Yes, I do.

Q. Does it say LandAmerica American Title Company, Plaintiff versus [Father], Defendant?

A. Correct.

Respondent's Exhibit 43 is the second amended petition in the LandAmerica lawsuit. The cause number indicates the original petition was filed in 2007, and the second amended petition was filed in 2008. Father's nonresponsive statements were that the lawsuit "was dismissed instantly. It was never filed." The exhibit showed the suit was filed and that it had been on file between approximately four and sixteen months. Thus, it was not "instantly dismissed."

Father's assertion on appeal that the suit was for "fraud and other claims" is also incorrect. The petition shows LandAmerica sued Father for civil theft under the Theft Liability Act for appropriating embezzled funds, conversion, conspiracy, unjust enrichment, and money had and received, but nowhere does the suit allege Father committed fraud.

On appeal, Father argues the evidence was not admissible because the lawsuit was dismissed. However, except for Father's nonresponsive and contradictory statement that the suit was dismissed but never filed, no evidence cited by Father shows it was dismissed. Moreover, Father cites no authority for his argument that a petition in a lawsuit that was dismissed cannot be

relevant. Father does not explain on appeal why the petition was not admissible for impeachment purposes. We conclude Father has not shown the trial court erred by overruling his objection.

"Shoulder Checking" Incident

Father also complains on appeal about the admission of evidence that while he was jogging on a walking trail, he "shoulder-checked" ladies on the trail. Father cites to two sections of testimony concerning this incident.

In the first section of testimony, Mother's attorney asked Father, "Isn't it true that you shoulder-checked some older ladies while they were walking on the [trail] in your neighborhood?" Father's attorney objected that the question was not relevant and was impermissible under Rules of Evidence 404 and 405. The trial court sustained the objection.

In the second section of testimony, the court-appointed psychiatrist testified without objection about this incident:

> Q. (By [Mother's attorney]) Now, you said that the initial concern was [Father's] anger. Could you tell us a little bit more about that, if you recall?
>
> A. Yes, ma'am, I can. It specifically related to . . . an incident that had occurred at his gated community.
>
> Q. What was that incident?
>
> A. The incident at the gated community, there were two older individuals, ladies who were walking on the jogging path. [Father] had had some difficulties going around them in the past, and eventually he pushed them down, and I think one reported she was injured. So the Court had some concerns that in this particular matter regarding children that he might have some difficulties controlling his temper.

Because the trial court sustained Father's objection to the first section of testimony and Father did not object to the second section of testimony, Father failed to preserve any error concerning this incident.

Further Argument

Father argues on appeal that all of this evidence was character evidence that was inadmissible under Rule of Evidence 404(b). Rule 404(b) provides, "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." EVID. 404(b). The list of subjects for which evidence of crimes or other bad acts may be admissible is not exclusive. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). In this case, Mother's position was that Father had a narcissistic personality disorder and antisocial traits. The incidents of Father's bad conduct were evidence the mental-health expert witnesses used to support their diagnoses. Father cites no authority showing the evidence of Father's bad acts was not admissible under Rule 404(b) for this purpose.

Father also asserts the evidence of his prior bad acts was inadmissible under Rules of Evidence 608 and 609. Rule 608 concerns evidence of a witness's character for truthfulness or untruthfulness. *See* EVID. 608. Rule 609 concerns use of a criminal conviction to attack a witness's character for truthfulness. *See* EVID. 609. Father did not object to the evidence of the prior bad acts under either of these rules. Therefore, he has not preserved any error. *See* TEX. R. APP. P. 33.1.

We conclude Father has not shown the trial court abused its discretion by admitting the evidence discussed above. We overrule his second issue.

JUDICIAL TESTIMONY

In his third issue, Father contends the trial court erred by admitting into evidence its orders containing findings by the court because the orders with the findings constituted testimony by the

trial judge that usurped the jury's role on the issues of conservatorship, property characterization, and fraud. Rule of Evidence 605 provides, "The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue." Father argues the admission into evidence of the trial court's orders containing fact findings on these areas violated rule 605.

Father relies on the supreme court's opinion in *In re M.S.,* 115 S.W.3d 534 (Tex. 2003). In that case, a suit to terminate the appellant's parental rights, the appellant complained that the trial court's pre-trial temporary orders contained findings of fact on the best interest of the children and that the orders constituted testimony by the presiding judge. The supreme court stated, "A judge's findings of fact are not technically the same as testimony." *Id.* at 583. The supreme court determined that the findings were comments on the weight of the evidence that should have been redacted. However, the appellant "did not object to the admission of the orders on this basis." *Id.* The court went on to conclude that even if the appellant had preserved error, the error was not harmful and therefore not reversible. *Id.*

Applying *M.S.* to this case, we conclude the trial court's findings of fact in the orders are not judicial testimony. Father did not object at trial or argue on appeal that the findings were inadmissible comments on the weight of the evidence. Therefore, any error from the findings being comments on the weight of the evidence was not preserved and is not presented for review on appeal.

We conclude the admission of the orders did not violate rule 605. We overrule Father's third issue.

BANKRUPTCY DOCUMENTS

In his fourth issue, Father contends the trial court abused its discretion by excluding the Fourth Amended Plan of Reorganization from Father's bankruptcy proceeding. Father filed for bankruptcy protection under Chapter 11 of the Bankruptcy Act in December 2011. Father did not

submit a plan of reorganization in the bankruptcy proceeding. Instead, Mother and the bankruptcy trustee filed the plan.

At trial, Father testified during examination by his attorney that he had filed for bankruptcy. During cross-examination by Mother's attorney, the trial court admitted without objection Father's bankruptcy schedules showing his total assets and liabilities. During Father's case in chief, Father offered into evidence the Fourth Amended Plan for Reorganization prepared by Mother and the bankruptcy trustee and filed in Father's bankruptcy case. The plan lists Father's property and states whether the property is community property or Father's separate property. The plan lists as separate property some items that Mother asserted in the divorce proceeding were community property.

Father presented the bankruptcy plan in an offer of proof. He presented two arguments for why the plan was admissible: (1) it showed Mother's "state of mind as to the characterization of property"; and (2) Mother "opened the door also by introducing into evidence [Father's] bankruptcy filing."

On appeal, Father argues the trial court abused its discretion by excluding the plan because (1) it was an admission by a party opponent and (2) Mother opened the door to the evidence. Concerning the first argument on appeal, that the plan was an admission, Father did not present this argument in the trial court. Because his argument on appeal that the plan is an admission by Mother does not comport with his assertion at trial that the plan shows Mother's state of mind and Mother opened the door to the evidence, the argument is not preserved for appellate review. *See Basic Energy Serv., Inc. v. D-S-B Props., Inc.*, 367 S.W.3d 254, 264 (Tex. App.—Tyler 2011, no pet.) ("An objection on appeal that is not the same as that urged at trial presents nothing for review.").

Concerning the second argument, that Mother opened the door to the evidence, a party opens the door to evidence by injecting collateral and otherwise-objectionable issues into a lawsuit or by presenting a witness's testimony that conveyed a false impression. *See Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 235 (Tex. 2007) (quoting from W. JEREMY COUNSELLOR & CHARLES D. BROWN, HANDBOOK OF TEXAS EVIDENCE § 4.01.03 (2005): "A party can make otherwise irrelevant evidence relevant by injecting collateral issues into a lawsuit. This is called 'opening the door.' Once a party opens the door . . . the opposing party may offer rebuttal evidence on the collateral issue."); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 906–07 (Tex. 2000) (trial court did not err by admitting reports that nursing home had been cited for rendering improper care; without that evidence, "the jury would be left with a false impression that Horizon had not been cited for rendering improper care when, in fact, it had"); *Durbing v. Dal-Briar Corp.*, 871 S.W.2d 263, 270 (Tex. App.—El Paso 1994, writ denied) (employer opened door to evidence that other employees were fired for filing workers' compensation claims).

The bankruptcy schedules admitted into evidence were supposed to list all the property Father possessed. They also characterized the property as separate or community. Mother did not use the schedules as evidence of the characterization of the property. Instead, she used the schedules to impeach Father and to show his lack of cooperation in the divorce by pointing out that the bankruptcy schedules listed eight assets that were not included in Father's inventory and appraisement filed in the divorce proceeding, which was also supposed to list all of Father's property. She also used the schedules to show they did not list five entities that were listed on the inventory and appraisement and to show there were some assets Father did not list on either the bankruptcy schedules or the inventory and appraisement. Because Mother did not use the bankruptcy schedules for any purpose other than for impeachment by showing disparities between them and the inventory and appraisement, the trial court could conclude Mother did not use them

for characterization of the property and therefore did not open the door to other bankruptcy documents characterizing the property.

Moreover, the trial court could reasonably conclude the bankruptcy schedules and plan were not evidence of the characterization of the property. Property possessed by a spouse at the time of divorce is presumed to be community property. FAM. § 3.003(a) (West 2006). A spouse claiming property as separate property must present "clear and convincing evidence" that the property is separate property. *Id.* § 3.003(b). The spouse claiming property as separate must trace the property to its separate-property origins. *Pearson v. Fillingim*, 332 S.W.3d 361, 363 (Tex. 2011). "Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property." *Zagorski v. Zagorski*, 116 S.W.3d 309, 316 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). The bankruptcy schedules and the plan of reorganization did not trace the separate-property origins of the property. Therefore, they are not evidence that any property is separate property. Father did not cite any authority showing that the documents may be evidence that certain property is separate property.

We conclude the trial court did not err by excluding from the evidence the Fourth Amended Plan of Reorganization. We overrule Father's fourth issue.

AMICUS ATTORNEY

In his fifth issue, appellant contends the trial court erred by allowing the amicus attorney to participate in the trial beyond the limits provided in the Family Code.[2]

The amicus attorney's role "is to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child." FAM. §

[2] The statement of the issue in the "Issues Presented" section of Father's brief is: "Did the amicus attorney's repeated attempts to adopt a testimonial role in the case, including making his own recommendation to the jury and testifying in examination and through admitted e-mails, cross the line and constitute impermissible amicus testimony in violation of Tex. Fam. Code § 107.0[0]7?"

107.001(1) (West Supp. 2017). The amicus attorney must "participate in the conduct of the litigation to the same extent as an attorney for a party," *id.* § 107.003(a)(1)(F), and must "advocate the best interests of the child after reviewing the facts and circumstances of the case." *Id.* § 107.005(a) (West 2014). The amicus attorney "may not . . . (3) submit a report into evidence; or (4) testify in court except as authorized by Rule 3.08, Texas Disciplinary Rules of Professional Conduct." *Id.* 107.007(a)(4) (rule 3.08 is "Lawyer as Witness" rule).

On appeal, Father argues there were numerous times when the amicus attorney testified. One of those was when the amicus attorney said in his opening statement that he would be making a recommendation about custody at the end of the trial:

> I am going to withhold my final recommendation to you until the parties have had their opportunity to put on whatever evidence they want to, their lawyers have had whatever opportunity they want to to [sic] make whatever arguments they want to make, and at the conclusion of that for my part I will make whatever recommendation and opinion I believe the evidence shows is in the best interest of [the children].

Father did not object to this statement. On the third day of trial, Father requested the court prohibit the amicus attorney from making a recommendation during jury argument at the end of the case. Father argued the amicus attorney's recommendation at the end of the trial would constitute testimony by the amicus attorney. He also argued that because the amicus attorney represented the trial court, the amicus attorney's recommendation would constitute a comment on the weight of the evidence by the court. The trial court denied Father's request. During closing argument, the amicus attorney discussed the evidence concerning three of the factors the jury was instructed to consider in determining whether Mother and Father should be joint managing conservators.[3] After discussing the evidence concerning the factors, the amicus attorney stated,

[3] Those three factors are:

> 1. whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators;

> So you are really left, in my opinion, with the weight of the evidence, with one decision. As we have weighed the evidence on honesty, as we have weighed the evidence on ability to follow court orders, ability to put the children's interests first, mental health, I think there is only one name that the evidence and the law and the instructions that have been given to you that you write in this, and that's [Mother's] name. That's what my argument to you is and that the evidence has shown.
>
> I am baffled, completely baffled that [Father] has not seen these girls. I don't know how you can get to know them through the evidence and be a parent of these two precious girls and somehow stay away from them. That is completely baffling to me. I do not understand that. I do not think that has been explained to you by the evidence.

Before the jurors retired to deliberate, the trial court instructed them:

> Members of the jury, as you are about to leave, let me remind you once again that the evidence you heard came from the witness chair. The evidence is not argument of counsel, not opening statements, not closing arguments, and you need to base your decisions upon your recollection of the facts as presented to you from the witness stand and from documents and the video tapes.

We conclude the amicus attorney's arguments did not constitute testimony. The statements were not the amicus attorney's bare opinions but were a summary of the evidence and reasonable inferences and deductions drawn from the evidence, which are proper forms of jury argument. *See In re BCH Dev., LLC*, 525 S.W.3d 920, 928 (Tex. App.—Dallas 2017, orig. proceeding). Furthermore, the trial court instructed the jurors that "[t]he evidence is not argument of counsel, not opening statements, not closing arguments," so the jurors should have had no confusion about whether the amicus attorney's opening statement and jury argument constituted evidence.

Father also argues the amicus attorney testified through his e-mails that were admitted into evidence and through testimony about those e-mails and conversations witnesses had with the amicus attorney. With one exception, discussed below, Father did not object to any of this evidence on the ground that it constituted testimony by the amicus attorney. Therefore, any error

---

> 2. the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest; [and]
>
> 3. whether each parent can encourage and accept a positive relationship between the child and the other parent . . . .

The charge also listed three other factors the amicus attorney did not discuss.

from the admission of that evidence was not preserved for appellate review. TEX. R. APP. P. 33.1(a).

Respondent's exhibit 86 was the one piece of evidence to which Father objected as constituting testimony by the amicus attorney. That exhibit was an e-mail by the amicus attorney and Father's response to it. The amicus attorney's e-mail was addressed to a group of recipients to whom Father had been communicating his perceptions concerning the treatment of the children and himself during the three years of the divorce proceedings. The amicus attorney's e-mail informed the group that C.'s enrollment at her school was in jeopardy because of all the e-mails about the divorce received by the principal and staff of the school and by the parents of other students at the school. The amicus attorney asked the group not to send any e-mails to the principal and staff of the school or parents of other students unless the e-mails were school related. The trial court overruled Father's objections to the e-mail and admitted it into evidence.

Even if the e-mail constitutes testimony by the amicus attorney and its admission was an abuse of discretion by the trial court, we cannot reverse unless the evidence "probably caused the rendition of an improper judgment." Father, as the party asserting error from the admission of the evidence, had the burden to show the error probably caused the rendition of an improper judgment. *Loerra v. Fuentes*, 511 S.W.3d 761, 776 (Tex. App.—El Paso 2016, no pet.). To meet this burden, Father was required to show the admission of the evidence probably resulted in the rendition of an improper judgment. He was not required to prove that but for the admission of the evidence, the outcome would have been different. *See Lopez v. La Madeleine of Tex., Inc.*, 200 S.W.3d 854, 864 (Tex. App.—Dallas 2006, no pet.); *17090 Parkway, Ltd. v. McDavid*, 80 S.W.3d 252, 259 (Tex. App.—Dallas 2002, pet. denied). Father makes no argument showing how the admission of the amicus attorney's statements in the e-mail could have caused the rendition of an improper judgment. Therefore, he has not met his burden of showing any error was reversible.

We overrule Father's fifth issue.

CONCLUSION

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

160285F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF C.F.M. AND B.C.M., CHILDREN No. 05-16-00285-CV	On Appeal from the 255th Judicial District Court, Dallas County, Texas Trial Court Cause No. DF-09-02559-S. Opinion delivered by Justice Myers. Justices Lang-Miers and Boatright participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Nikki Slaughter McCray recover her costs of this appeal from appellant Stewart Phillip McCray.

Judgment entered this 9th day of April, 2018.