Affirmed and Opinion Filed January 2, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00160-CV

IN THE INTEREST OF G.E.D., A CHILD

On Appeal from the 470th Judicial District Court
Collin County, Texas
Trial Court Cause No. 470-51847-2008

MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Whitehill

This case involves an order modifying the custody arrangement among Mother, Father, and their eight-year-old daughter G.E.D. The prior order gave Mother the exclusive right to designate G.E.D.'s primary residence within Tarrant County, Collin County, or a county contiguous to Collin County. The modification order gave Father the exclusive right to designate G.E.D.'s primary residence within Dallas County or a contiguous county. Mother appeals the modification order in three issues.

Mother's first issue contends that the trial court lacked jurisdiction to render its modification order because the prior custody order was then on appeal to this Court. Her second and third issues attack the sufficiency of the evidence to support certain trial court findings. We affirm because (i) our precedent holds that Mother's pending appeal did not negate the trial

court's jurisdiction to enter the subsequent modification order and (ii) there was some evidence on which a reasonable trial judge could have decided the case as did the trial court here.

I. BACKGROUND

G.E.D. was born to Mother and Father in 2008. Mother and Father later divorced.

In early 2016, Father sought to modify the parent–child relationship. The matter was tried without a jury on July 6, 2016. The trial judge rendered a SAPCR memorandum ruling that day but did not sign a written order until August 16, 2016. The order granted Father's requested relief by (i) requiring that G.E.D.'s residence be established in Collin County, a contiguous county, or Tarrant County as long as Father lived in one of those counties and (ii) imposing an expanded standard possession order. Mother appealed that order, and we docketed that appeal as No. 05-16-01285-CV, which is still pending.

In October 2016, Father filed a motion to enforce the trial court's SAPCR order. He alleged that Mother had not established G.E.D.'s residence in a permitted county and had wrongfully withheld G.E.D. from Father on 17 different days. He further alleged that Mother had moved with G.E.D. to Katy, Texas, and had hidden her from Father.

Father's enforcement motion was set for hearing on December 12, 2016. When the hearing began, the parties told the court that they had reached an agreement.[1] Father testified that he and Mother had agreed, among other things, that (i) Father and Mother would remain G.E.D.'s joint managing conservators, (ii) Father would have the exclusive right to designate G.E.D.'s primary residence within Dallas County or a contiguous county, and (iii) Mother would have standard visitation for parents living over 100 miles from a child. The court asked for clarification of whether the parties intended a temporary modification or a new final order, and

[1] The docket sheet also indicates that a Rule 11 agreement was filed that day, but that filing is not in the clerk's record on appeal. However, a copy of the filemarked Rule 11 agreement appears later in the clerk's record as an attachment to a later filing by Mother.

counsel for both sides agreed that it would be a new final order. The judge then said, "And I have rendered those [agreement terms] as the orders of this court, so neither side can revoke after today."

Four days after the hearing, Father filed a new petition to modify parent–child relationship. The petition sought an order giving Father the right to determine G.E.D.'s primary residence.

About two weeks later, Father filed a motion to enter final order incorporating the parties' agreement.

Mother answered Father's petition to modify with a general denial, and soon thereafter she filed a combined motion to withdraw her consent to the agreement and, in the alternative, motion to modify any order resulting from the parties' alleged agreement. She supported the motion with her declaration asserting that she signed the December 12 agreement under duress.

Mother then filed an "Opposition to Motion to Enter Final Order," arguing that the trial court should not render an order based on the parties' agreement. She contended, among other things, that the parties' written Rule 11 agreement (which was attached to her Opposition) was unclear and ambiguous.

On January 27, 2017, the trial court held a hearing on Father's motion to enter order. Both parents testified. At the end of the hearing, the judge concluded that Mother did not revoke the Rule 11 agreement before the court rendered judgment on it. The judge then signed a final order reducing that judgment to writing. The order made the parents joint managing conservators and gave Father the exclusive right to determine G.E.D.'s primary residence within Dallas County or a contiguous county. The order also contained a standard possession order giving Mother possession of G.E.D. for one weekend per month if she lived more than 100 miles away from G.E.D.'s residence.

The judge later signed findings of fact and conclusions of law stating, among other things, that:

- "The parties entered into a written agreed parenting plan containing provisions for conservatorship and possession of the child and for modification of the parenting plan."
- "The circumstances of the child and the conservators had materially and substantially changed since the date of the rendition of the order modified."
- "The agreed parenting plan was in the child's best interest."

Mother timely appealed.

II. ANALYSIS

A. Issues Presented

Mother presents three issues:

1. Was the trial court's January 27, 2017 final order void for lack of jurisdiction because of Mother's prior appeal from the August 16, 2016 final order?
2. Was the evidence legally and factually insufficient to support a finding that circumstances had materially and substantially changed since August 16, 2016?
3. Was the evidence legally and factually insufficient to support a finding that giving Father the exclusive right to designate G.E.D.'s primary residence was in G.E.D.'s best interest?

B. Issue One: Did the prior pending appeal deny the trial court jurisdiction to render the subsequent modification order?

Mother's first issue attacks the trial court's jurisdiction to render the modification order signed on January 27, 2017.

1. Error Preservation

Mother does not assert that she raised her jurisdictional complaint in the trial court, and we have not found anything in the record suggesting she did so. But as a general rule "[j]urisdiction may be raised for the first time on appeal and may not be waived by the parties."

Univ. of Houston v. Barth, 313 S.W.3d 817, 818 (Tex. 2010) (per curiam). So we address Mother's argument.

2. Analysis

Mother relies on the general rule that a trial court loses jurisdiction over a controversy once an appeal is perfected, provided that the trial court retains plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment for 30 days after signing the judgment, or 30 days after certain timely postjudgment motions are overruled. *See* TEX. R. CIV. P. 329b(d), (e); *In re Norris*, 371 S.W.3d 546, 550 (Tex. App.—Austin 2012, orig. proceeding). According to Mother, the January 27, 2017 final order was signed outside the trial court's plenary power running from its previous August 16, 2016 final order, so the trial court lacked jurisdiction to render the January 27, 2017 order.

Although Mother acknowledges that there are exceptions to the foregoing rule, she argues that the exceptions do not apply here:

For example, a trial court can enforce its judgment during an appeal if the judgment has not been superseded. *See In re Lovell*, No. 14-11-00197-CV, 2011 WL 1744211, at *2 (Tex. App.—Houston [14th Dist.] May 5, 2011, orig. proceeding) (mem. op.) ("When the judgment has not been superseded, the trial court has jurisdiction to hear a motion to enforce, even though the judgment has been appealed."). But, Mother argues, the January 27, 2017 order was a new final order affecting the parent–child relationship, not an order enforcing the August 16, 2016 order.

Similarly, Family Code § 109.001 authorizes the trial court to make certain orders up to 30 days after a SAPCR appeal is perfected. *See* TEX. FAM. CODE § 109.001 ("Temporary Orders During Pendency of Appeal"). But the January 27, 2017 order was made more than 30 days after Mother perfected her appeal from the August 16, 2016 order.

And Mother notes that the appellate rules provide a procedure for use when a case settles during appeal. *See* TEX. R. APP. P. 42.1. But that procedure was not used in this case.

Thus, Mother concludes, the trial court lacked jurisdiction to render the January 27, 2017 order, and we should hold that it is void.

Father, however, argues that the trial court had jurisdiction to act for two reasons: (i) the January 27, 2017 order was a proper exercise of the trial court's enforcement jurisdiction and (ii) as the court of continuing, exclusive jurisdiction, the trial court had jurisdiction to entertain a new modification proceeding despite the pending appeal from the prior modification order. We agree with his second argument and do not address his first.

There is a split in authority as to whether an appeal from a SAPCR order means that the court of continuing, exclusive jurisdiction loses jurisdiction to entertain a new modification proceeding. The El Paso Court of Appeals, deciding a case that had been transferred from the Fort Worth Court of Appeals, held that a trial court lacks jurisdiction to rule on a petition to modify while an appeal from a previous order affecting the parent–child relationship remained pending. *In re E.W.N.*, 482 S.W.3d 150, 157 (Tex. App.—El Paso 2015, no pet.).

But the Fort Worth Court of Appeals itself later disagreed with *In re E.W.N.*, holding that a trial court of continuing, exclusive jurisdiction has jurisdiction to adjudicate "a petition for modification pending appellate review of a prior final SAPCR order." *In re Reardon*, 514 S.W.3d 919, 930 (Tex. App.—Fort Worth 2017, orig. proceeding). The *Reardon* court found support in two older opinions, including one this Court issued under statutes in effect before the 1995 family code recodification. *See Blank v. Nuszen*, No. 01-13-01061-CV, 2015 WL 4747022, at *2 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.) (mem. op.); *Hudson v. Markum*, 931 S.W.2d 336, 338 (Tex. App.—Dallas 1996, no writ).

In *Hudson*, a trial court rendered an order determining Hudson's paternity of the child and ordering child support. While his appeal was pending, Hudson filed a motion to modify child support, which the trial court dismissed for lack of jurisdiction due to the pending appeal. Hudson then appealed the dismissal, and we reversed, holding that the trial court had continuing, exclusive jurisdiction to hear Hudson's motion regardless of the pending appeal. 931 S.W.2d at 338. We noted the statutory predecessor to current § 109.001 regarding certain trial court orders during an appeal, but we held that it did not bar the trial court from adjudicating "a new proceeding affecting [the parent–child] relationship." *Id.*

Hudson controls absent an intervening change in the law or a contrary en banc decision from our Court. *See MobileVision Imaging Servs., L.L.C. v. LifeCare Hosps. of N. Tex., L.P.*, 260 S.W.3d 561, 566 (Tex. App.—Dallas 2008, no pet.). Although the Family Code has been amended since *Hudson*, the statutes vesting trial courts with continuing, exclusive jurisdiction in parent–child matters have not changed in substance. *Compare Hudson*, 931 S.W.2d at 337–38 (discussing and quoting various sections of the pre-1995 family code), *with* FAM. §§ 155.001–.003, 156.001–.004. Thus, a trial court with continuing, exclusive jurisdiction has jurisdiction over a new proceeding to modify the parent–child relationship even if an appeal is pending from a previous order regarding that relationship.

It follows here that the trial court had jurisdiction to render a new modification order despite Mother's pending appeal of the August 16, 2016 order.[2]

We overrule Mother's first issue.

[2] *Reardon* provides additional statutory analysis supporting the *Hudson* rule. *See In re Reardon*, 514 S.W.3d at 923–30.

C. Issue Two: Did the trial court abuse its discretion by concluding that circumstances had materially and substantially changed after the trial court rendered the prior order?

The trial court found that the parents' and G.E.D.'s circumstances materially and substantially changed after the prior order was rendered. *See* FAM. § 156.101(a)(1). Mother's second issue argues that there is no evidence to support this finding.

We overrule Mother's second issue because there is a second, independent basis for the trial court's decision. Specifically, the family code provides at least four independent grounds for modifying a child-custody order: (i) the parties' agreement, (ii) the child's preference, (iii) a voluntary relinquishment, or (iv) a material and substantial change of circumstances. *See In re A.N.O.*, 332 S.W.3d 673, 677 (Tex. App.—Eastland 2010, no pet.) (citing FAM. §§ 153.007, 156.101). Here, the trial court found both that its modification order was rendered in accordance with the parties' written agreement and that the child's and conservators' circumstances had materially and substantially changed since the prior order's rendition. Because the parties' written agreement supports the trial court's order, we overrule Mother's second issue.

D. Issue Three: Did the trial court abuse its discretion by concluding that awarding Father the exclusive right to designate G.E.D.'s primary residence in Dallas County or a contiguous county was in G.E.D.'s best interest?

1. Standard of Review and Applicable Law

The trial court has broad discretion to determine which conservator has the exclusive right to establish a child's primary residence. *In re K.L.W.*, 301 S.W.3d 423, 428 (Tex. App.—Dallas 2009, no pet.). We review a decision regarding child custody, control, possession, or visitation for abuse of discretion. *Id*. at 424. A trial court abuses its discretion if it acts arbitrarily and unreasonably or without reference to any guiding principles. *Id*. at 424–25.

Under this standard, legal and factual insufficiency are not independent grounds of error, but they are relevant factors in our review. *Id*. at 425. In conducting our review, we consider

whether the trial court (i) had sufficient evidence upon which to exercise its discretion and (ii) erred in exercising that discretion. *Id*. We review the evidence in the light most favorable to the order, and we indulge every presumption in its favor. *In re C.C.J.*, 244 S.W.3d 911, 917 (Tex. App.—Dallas 2008, no pet.). If some probative and substantive evidence supports the order, the challenge fails. *In re K.L.W.*, 301 S.W.3d at 425.

To modify the August 16, 2016 SAPCR order, the trial court had to, and did, find that the modification was in the child's best interest. *See* FAM. § 153.007(b) ("If the court finds that the agreed parenting plan is in the child's best interest, the court shall render an order in accordance with the parenting plan.").

The supreme court identified several non-exclusive factors that may be relevant to a best-interest determination:

> Included among these [best-interest factors] are the following: (A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child; (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent. This listing is by no means exhaustive, but does indicate a number of considerations which either have been or would appear to be pertinent.

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976) (footnotes omitted).

Courts have also recognized other factors that can be relevant to a best-interest determination after a parental relocation, such as:

> (1) reasons for and against the move, (2) education, health, and leisure opportunities afforded by the move, (3) accommodation of the child's special needs or talents, (4) effect of extended family relationships, (5) effect on visitation and communication with the noncustodial parent, (6) noncustodial parent's ability to relocate, and (7) the child's age.

In re K.L.W., 301 S.W.3d at 425–26.

We note also that this state's public policy includes assuring "that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child." FAM. § 153.001(a)(1).

2. Scope of Review

We are presented with a threshold question: In reviewing the trial court's decision, are we limited to the evidence taken at the December 12, 2016 hearing (when the trial judge orally rendered judgment), or can we also consider the evidence taken at the January 27, 2017 hearing on Father's motion to enter final judgment? Mother's third issue refers only to evidence taken at the December 12, 2016 hearing. Father's brief, however, relies on evidence from both hearings. For the following reasons, we conclude that we can consider evidence from both hearings because the trial court effectively reopened the evidence at the January 27, 2017 hearing.

The proceedings developed in an unusual fashion. While the parties were operating under the August 16, 2016 modification order, Father filed an enforcement motion asserting that Mother had repeatedly and wrongfully withheld G.E.D. from him. But when the parties met at the courthouse for the hearing on Father's motion, they agreed to modify the August 16, 2016 order, in part by giving Father the exclusive right to designate G.E.D.'s primary residence. Only Father testified at that hearing. The trial court then orally rendered judgment that the parties' agreement was the new custody order. The parties filed a signed "Rule 11 Agreement" that same day, and Mother later attached a copy of the filemarked agreement to a separate filing.

Father later filed (i) a petition to modify the August 16, 2016 order and (ii) a motion to enter final order. Mother filed a motion to withdraw consent or, alternatively, to modify the order orally rendered on December 12, 2017. She also filed a separate opposition to Father's motion to enter final order.

On January 27, 2017, the trial court held a hearing on Father's motion to enter final order. Both parents testified, with Mother testifying first. When Mother began to testify, the court asked for clarification as to her grounds for opposing the order's entry, and her counsel explained that her grounds were (i) best interest of the child and (ii) she revoked her consent to the agreement before rendition. Later, Father's counsel responded to an objection by arguing that her questions were relevant to G.E.D.'s best interest. Thus, both parents addressed G.E.D.'s best interest at the January 27 hearing.

The law permitted the trial court to take additional evidence even after orally rendering the December 12, 2016 order. Rule 270 provides in pertinent part that, "[w]hen it clearly appears to be necessary to the due administration of justice, the court may permit additional evidence to be offered at any time." TEX. R. CIV. P. 270. "In a bench trial, the trial court may permit the introduction of additional evidence even after judgment has been entered if it does so within the court's plenary power." *Craft v. Davis*, No. 2-07-332-CV, 2008 WL 4180357, at *4 (Tex. App.—Fort Worth Sept. 11, 2008, no pet.) (mem. op.) (footnote omitted); *see also Harrison v. Bailey*, 260 S.W.2d 702, 704–05 (Tex. Civ. App.—Eastland 1953, no writ) (court did not err by admitting additional evidence after rendering judgment).

At the January 27, 2017 hearing, both Mother and Father testified about facts concerning G.E.D.'s best interest. The trial court still had plenary power then because it had not yet signed the new order. *See* TEX. R. CIV. P. 306a(1), 329b; TEX. R. APP. 26.1. Thus, we conclude that (i) the trial court effectively reopened the evidence at the January 27, 2017 hearing and (ii) the evidence from that hearing is before us as we assess Mother's third issue.

3. Application of Law to Facts

Mother's argument is straightforward: (i) the only best-interest evidence developed at the December 12, 2016 hearing was Father's testimony that Mother had violated the August 2016

custody order and denied Father visitation and (ii) that evidence was insufficient to show that the custody change was in G.E.D.'s best interest. But as discussed above, without opinion whether such evidence alone was sufficient, we can also consider the evidence developed at the January 27, 2017 hearing.

Father responds that (i) Mother cannot contest the trial court's best-interest finding because the judgment was an unappealable agreed judgment and (ii) the evidence was sufficient to support the best-interest finding. We agree with Father's second argument and need not address the first.

At the December 12, 2016 hearing, Father testified that after the court made its summer 2015 SAPCR order, Mother moved to a new residence outside the order's geographic restriction. He also said that the new residence's location was unknown to him at that time, but a friend at CPS helped him find G.E.D. He further said that he and Mother had agreed that G.E.D. would live with him in Dallas County or a contiguous county, and his understanding was that Mother would "continue to live in Katy, Texas." Father was going to let G.E.D. finish the semester at her school "in Houston," and then she would move in with him and be enrolled "back into the school that she was in last school year."

Both Mother and Father testified at the January 27, 2017 hearing. Mother testified to the following facts:

- G.E.D. was hysterical when Father took possession of her on December 16, 2016.
- After the August 2016 order was signed, Mother never specifically denied Father the opportunity to spend time with G.E.D. She had no desire to deny Father that opportunity in the future.
- Mother signed the Rule 11 agreement because everyone had told her that she would go to jail if she didn't.

- It was not in G.E.D.'s best interest to live with Father and to see Mother only once a month because G.E.D. is an eight-year-old girl and "[s]he doesn't know [Father] like that."

- Father has not been consistent in exercising his possession of G.E.D.

- Mother knew about the July 6, 2016 oral SAPCR ruling, and yet she violated the order by enrolling G.E.D. in school in Katy, Texas on August 11, 2016.

- Mother did not tell Father where she was living with G.E.D. This violated the summer 2016 SAPCR order.

- When the court rendered the prior SAPCR order, Mother was living in California, was not in a position to move back, and willingly violated the judge's order.

- There were times when Father left G.E.D. alone or without supervision.

- In Mother's view, she did not willingly violate the court's order by moving to the Houston area; rather, she had to violate it because she was in law enforcement and in that field it takes about a year to a year and a half to get hired by a new agency.

Father testified to the following facts:

- He did not see G.E.D. from July 31, 2016, which was the end of his summer possession, to December 16, 2016.

- After July 31, 2016, Father went to G.E.D.'s school to pick her up for his first weekend of possession and found out she was no longer enrolled there. He tried to contact Mother's mother and got no response.

- He eventually found G.E.D.'s school with the help of a CPS worker. He drove to Houston at least five times to see G.E.D., and he was not able to. However, G.E.D.'s school principal helped him get Mother served with papers by telling him where she would be.

- When the parties appeared in court on December 12, 2016, Mother and her attorney "basically drew up that whole thing [the agreed parenting plan]." Mother said she was entering the agreement because she was not going to move within the prior order's geographic restriction.

- When Father picked G.E.D. up on December 16, 2016, G.E.D. was not hysterical and did not cry at all.

- On January 4, 2017, Father drove to Houston through a snowstorm to pick G.E.D. up. When he arrived, Mother said that G.E.D. was with Mother's sister, and Father could pick her up the next day.

- G.E.D. has a cellphone. In the past, Father had not been able to call her on it because the number was blocked or the phone was not turned on.

The exhibits admitted at the January 27, 2017 hearing include some photographs showing G.E.D. and Father together. G.E.D. appears to be happy in those photographs.

Based on the whole record, the trial court did not abuse its discretion by concluding that G.E.D.'s best interest would be served by giving Father the right to designate G.E.D.'s primary residence in Dallas County or a contiguous county. There was evidence that Mother violated the prior SAPCR order by not establishing her residence within the geographic restriction and by not informing Father of her and G.E.D.'s whereabouts. There was evidence that Mother said she would not abide by the prior SAPCR order and would not move back within its geographic restriction. And there was evidence suggesting that there had been interference with Father's attempts to call G.E.D. on her cellphone. Furthermore, at least initially, Mother agreed to the arrangement. Finally, there was also evidence that G.E.D. was happy being with Father and that Father planned to re-enroll G.E.D. in the school she had attended before.

Given this evidence, the trial court could reasonably conclude that giving Father the exclusive right to establish G.E.D.'s primary residence (i) will promote her having frequent and continuing contact with both parents (*see* FAM. § 153.001(a)(1)); (ii) is consistent with the child's desires (*see Holley*, 544 S.W.2d at 372); and (iii) generally was in the child's best interest. Moreover, the trial court was entitled to disbelieve Mother's testimony contrary to the court's best-interest finding.

Finally, Mother directs our attention to *Armstrong v. Armstrong*, 601 S.W.2d 724 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.), but we conclude that case is not on point. In that case, the trial court signed a default modification order that changed the children's managing conservator from their mother to their father. At the time, the statute permitted such a modification only if there had been such a material and substantial change of circumstances that

(i) keeping the present managing conservator would be injurious to the children's welfare and (ii) the new managing conservator would be a positive improvement. *Id*. at 725. On appeal, the mother argued that there was no evidence of such a change of conditions, and the Beaumont court agreed. The only fact established was that the mother had moved to North Carolina and had denied the father visitation privileges in that state. The appellate court held that this was no evidence of the statutory requirement. *Id*. at 727.

Armstrong is distinguishable. *Armstrong* was about the sufficiency of the evidence to establish the statutorily required change of circumstances. In this case, we need not decide whether Father proved a sufficient change of circumstances because the unchallenged finding of a written parenting agreement presents an alternative basis for the modification. Mother's third issue concerns the child's best interest—an issue not raised in the *Armstrong* case.

We hold that the trial court did not abuse its discretion by concluding that giving Father the right to establish G.E.D.'s primary residence within Dallas County or a contiguous county was in G.E.D.'s best interest.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's final order in suit to modify parent–child relationship.

/Bill Whitehill
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF G.E.D., A CHILD

No. 05-17-00160-CV

On Appeal from the 470th Judicial District Court, Collin County, Texas
Trial Court Cause No. 470-51847-2008.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

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

It is **ORDERED** that appellee Averille Dansby recover his costs of this appeal from appellant Chelsea Dilworth.

Judgment entered this 2nd day of January, 2018.