AFFIRMED and Opinion Filed August 10, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00852-CV

IN THE INTEREST OF B.M.B. AND K.A.B., CHILDREN

On Appeal from the 302nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-11-11126

MEMORANDUM OPINION

Before Justices Schenck, Osborne, and Smith
Opinion by Justice Smith

Appellant Father appeals the trial court's September 18, 2020 amended final order in a suit to modify the parent-child relationship. In five issues, Father argues the trial court abused its discretion in (1) awarding Father below minimum standard possession without an express finding that it was in the best interest of the children; (2) increasing Father's child support obligation because there was no evidence presented showing a material and substantial change; (3) ordering Father to pay $300,000 in attorney's fees incurred by Mother; (4) restricting Father's parental rights and duties; and (5) giving sole authority to the children in choosing extra-curricular activities. For the reasons discussed below, we affirm the judgment of the trial court.

Background[1]

Mother and Father divorced in 2012. The trial court appointed each of them as joint managing conservators of their two minor children, B.M.B. and K.A.B. The amended final decree of divorce, entered on August 20, 2012, also ordered that each child shall be limited to one sport, chosen by Father, and one cultural activity, chosen by Mother. Father was given expanded standard possession and ordered to pay child support in the amount of $1,875 per month.

Since the amended decree was entered in 2012, the parties have continuously litigated custody and possession issues. In 2014, the amended decree was modified to provide for a 50/50 possession schedule. Mother filed a petition to modify in 2016, and Father filed a counterpetition to modify in 2019. Countless temporary orders were entered from 2016 until a final trial occurred in February 2020, on Mother's fifth-amended petition filed in 2020 and Father's counterpetition filed in 2019.

The trial court signed its amended final order on September 18, 2020, which was effective May 20, 2020, the day the court issued its memorandum ruling. The parties remained joint managing conservators; however, Mother was appointed

[1] Writing this opinion presents an unusual problem because the briefs and appellate record are under a sealing order that we must respect. *Kartsotis v. Bloch*, 503 S.W.3d 506, 510 (Tex. App.—Dallas 2016, pet. denied). However, we also must hand down a public opinion explaining our decisions based on the record. *See* TEX. R. APP. P. 47.1, 47.3. Accordingly, we have made every effort to preserve the confidentiality of the information, have avoided references to as much information as possible, and have made some references deliberately vague to avoid disclosing confidential details. *See MasterGuard, L.P. v. Eco Techs. Int'l LLC*, 441 S.W.3d 367, 371 (Tex. App.—Dallas 2013, no pet.).

primary joint managing conservator with the exclusive right to determine the children's primary residence in Dallas County; to make all educational decisions for the children after consultation with Father; to determine where and how the children should attend school; to make all healthcare, medical, dental, and surgical treatment decisions involving invasive procedures after consultation with Father; to make decisions involving psychiatric or psychological treatment or care after consultation with Father; and to apply for passports for the children. The trial court deviated from the standard possession order in setting Father's possession schedule at every other weekend from the time school is out, or 6 p.m. if school is not in session, through the time school resumes on Monday, or at 8 a.m. if school is not in session. Father's Thursday possession was eliminated, and the parties were ordered to alternate weeks of possession during the summer.

Additionally, Father's ability to choose a sport was suspended and, instead, the children were allowed to participate in a sport or athletic endeavor of their own choosing. The final order also vacated all previous orders requiring parenting facilitation. The trial court found Father's net resources exceeded $9,200 per month and increased his child support obligation to $2,070 per month. The trial court also awarded Mother $300,000 in attorney's fees. This appeal followed.

Modification of Possession Order

We review a trial court's order modifying custody, possession, and visitation under an abuse of discretion standard. *In re M.M.S.*, 256 S.W.3d 470, 476 (Tex.

App.—Dallas 2008, no pet.). A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." *Id.* at 242. To determine whether a trial court abused its discretion in modifying a parent's possession, we look to whether the trial court had sufficient information on which to exercise its discretion and, if so, whether it acted reasonably in applying its discretion based on the information before it. *M.M.S.*, 256 S.W.3d at 476. Challenges to the legal and factual sufficiency of the evidence are not independent grounds of review but are relevant factors in determining whether the trial court abused its discretion. *Id.* "There is no abuse of discretion so long as some evidence of a substantive and probative character supports the trial court's decision." *Id.*

Father argues that Mother did not present sufficient evidence to rebut the presumption that the standard possession order is in the best interest of the children and provides the reasonable minimum possession of a child for a parent named as joint managing conservator.[2] Father also argues that the possession order contradicts

[2] *See* TEX. FAM. CODE ANN. § 153.252 (providing "there is a rebuttable presumption that the standard possession order . . . (1) provides reasonable minimum possession of a child for a parent named as a possessory conservator or joint managing conservator; and (2) is in the best interest of the child").

the stated public policy under section 153.251(b)[3] because it does not encourage frequent contact or optimize the development of a close and continuing relationship with his children. Father further argues that the trial court failed to state, in writing, the specific reasons for deviating from the standard possession order in awarding him less time even though he submitted a request for findings of fact and conclusions law and that such failure is harmful error in his appeal.

Although Father filed a timely request for findings of fact and conclusions of law specifically requesting the trial court to make findings regarding its reasons for ordering possession that varied from the standard possession order, Father did not file a notice of past-due findings of fact and conclusions of law as required by the Texas Rules of Civil Procedure. *See* TEX. FAM. CODE ANN. § 153.258 (providing that a request for findings when the trial court's order varies from the standard possession order must conform to the Texas Rules of Civil Procedure). Rule 297 provides the trial court twenty days to file its findings of fact and conclusions of law after a timely request is filed. TEX. R. CIV. P. 297. If the trial court fails to file its findings, the requesting party must file a "Notice of Past Due Findings of Fact and Conclusions of Law" within thirty days after filing its initial request. *Id.*

Here, Father filed his request for findings of fact and conclusions of law on September 21, 2020, just one day after the trial court entered its final order in the

[3] "It is the policy of this state to encourage frequent contact between a child and each parent for periods of possession that optimize the development of a close and continuing relationship between each parent and child." TEX. FAM. CODE. ANN. § 153.251(b).

modification suit. However, Father did not file a notice of past due findings until December 1, well over thirty days after he filed his September 21 request. By that time, the case had been transferred to the 330th Judicial District Court, after the trial judge who heard the case voluntarily recused herself at Father's request,[4] even though an assigned judge had previously denied the motion finding that it was based solely on Father's disagreement with the judge's rulings, and after another trial judge voluntarily recused herself. The judge of the 330th Judicial District Court advised Father that his request was "outside the prescribed statutory period" and he "may want to consider making [his] request to the Court hearing the underlying matter" as "[t]here should be no expectation that this Court could endeavor to respond to such a request since this Court was not the trier of fact." Father then sought to recuse the judge of the 330th Judicial District Court, which was denied.

At oral argument, Father argued that any attempt to file a past-due notice would have been futile in this case because the trial judge recused herself before findings were due. Father did not, however, make this argument in his brief. In fact, in Father's reply brief, he argues that because the trial judge did not die, resign, or become disabled, as is covered in TEX. R. CIV. P. 18, she was able and required to enter findings even if the twenty-day deadline had passed. He further requests this Court to abate this case and remand it so that the trial judge can enter findings.

[4] The record on appeal does not indicate when the trial judge recused herself, and Father did not request such order to be included in the clerk's record although he did include the October 6, 2020 order of recusal in the appendix to his brief.

However, by failing to timely file notice of past due findings of fact and conclusions of law, Father waived any complaint on appeal that the trial court failed to file findings in this case. *See Ad Villarai, LLC v. Pak*, 519 S.W.3d 132, 137 (Tex. 2017).

When there are no findings of fact or conclusions of law because a party failed to timely request them, we infer that the trial court made all necessary findings to support the deviation from the standard possession order. *Jacobs v. Dobrei*, 991 S.W.2d 462, 463–64 (Tex. App.—Dallas 1999, no pet.) (citing *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989) (per curiam)). We consider only the evidence most favorable to the trial court's judgment and uphold the judgment on any legal theory that finds support in the evidence. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam). Even when the trial court deviates from the standard possession order, the court shall be guided by its guidelines and may consider "(1) the age, developmental status, circumstances, needs, and best interest of the child; (2) the circumstances of the managing conservator and of the parent named as a possessory conservator; and (3) any other relevant factor." TEX. FAM. CODE ANN. § 153.256.

There has been constant litigation regarding Mother and Father's divorce and the custody and possession of their two children since their divorce decree was entered in 2012. During the course of the litigation pertaining to this modification suit, the trial court granted three temporary restraining orders against Father. The evidence at trial showed that the exchanges between the two parties were often

confrontational because Father would not stay in his car or home during the exchanges as previously ordered. Although his therapist did not characterize him as having an anger problem, he did assist him in dealing with his anger and frustration and testified that Father was "[n]ot as successful as [he] would want." The evidence also showed that Father confronted Mother and the children at a counseling session because the girls were not answering his calls and that he pulled them out of several sporting events because he did not believe Mother and her new husband should be present at the events.

The parties disputed the amount of time the girls should spend in extracurricular activities and disagreed as to their school schedules; the appointed parenting facilitator was not successful in assisting them reach agreements over the years. Mother testified the children were anxious, stressed, and sad.

Although Father denied Mother's allegations of being aggressive at exchanges, preventing the children from attending dance, threatening the children in any way, and causing the children to suffer anxiety or depression, the trial court was the sole judge of the credibility of the witnesses' testimony and was free to believe Mother's evidence pertaining to the events instead of Father's. *See In re A.P.S.*, 54 S.W.3d 493, 497 (Tex. App.—Texarkana 2001, no pet.) ("[T]he trial court has wide discretion in judging credibility because it observes the parties' testimonies first hand and is in a better position than the appellate court to judge sincerity and honesty."). The trial court was also not required to implement the custody

evaluator's recommendation of possession, which was to continue with a modified expanded possession schedule, but was, instead, free to weigh such recommendation against the evidence presented in determining a schedule that was in the best interest of the children. *See* TEX. FAM. CODE ANN. § 153.002 ("The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.").

The trial court found, as provided in its final order, that good cause existed to deviate from the standard possession order because it was unworkable and inappropriate in this case. The trial court further found that severe parental conflict, the escalated hostility, and the unwillingness to communicate were behaviors that proved the parents did not get along or communicate well, which was not in the children's best interest. In an attempt to minimize the instances of conflict and hostility, the trial court limited the exchanges between the parents by eliminating the mid-week exchange and ordering alternating weekend possession instead of first, third, and fifth weekends, which would sometimes allow a parent to have the children on back-to-back weekends, a schedule the trial court also found not to be in the best interest of the children.

The trial court's order also indicates that it interviewed the children in chambers following the trial, which could have further guided the court's decision as to the possession schedule. *See* TEX. FAM. CODE ANN. § 153.009(b); *Voros v. Turnage*, 856 S.W.2d 759, 763 (Tex. App.—Houston [1st Dist.] 1993, writ denied)

(presuming evidence from children's interview in chambers supported the trial court's findings where party did not request interview to be recorded and interview was not contained in the appellate record). According to the custody evaluator, the oldest child was "really beaten" down by the conflict between her parents, and both children preferred to spend more time with Mother.

We cannot conclude, based on the record before us, that the trial court's decision to limit the disruption in the children's routines was arbitrary or unreasonable. *See, e.g.*, *Voros*, 856 S.W.2d at 762 (trial court did not abuse its discretion by eliminating mid-week visitation where evidence showed exchanges were hostile and father failed to bring children to games during his period of possession disrupting the children's involvement in extra-curricular activities). "The Family Code does not require that a trial court make a predicate finding of endangerment before it deviates from the standard possession order." *In re S.C.B.*, 581 S.W.3d 434, 439 (Tex. App.—El Paso 2019, no pet.) (citing TEX. FAM. CODE ANN. §§ 153.253, 153.256). Father's first issue is overruled.

Modification of Parental Rights

The trial court also retains broad discretion in deciding the rights and duties of each conservator to promote the children's best interest. *Coburn v. Moreland*, 433 S.W.3d 809, 828 (Tex. App.—Austin 2014, no pet.). The trial court may limit the rights of a parent if it makes a written finding that the limitation is in the best interest of the child. TEX. FAM. CODE ANN. § 153.072.

Father argues that the trial court failed to make the required best interest finding to support limiting his rights and that such limitations are in direct conflict with the recommendations of the custody evaluator. However, as discussed above, the trial court was not bound by the custody evaluator's recommendations, which as to parental rights suggested that the parties make decisions based on input from each other by communicating through Our Family Wizard and that, if the parents could not agree with assistance from the parenting facilitator and amicus attorney, the parenting facilitator and amicus attorney would hire an expert to decide. Thus, his recommendation was essentially that neither parent have the exclusive right to make decisions for the children. This recommendation was based on his opinion that Mother and Father could not communicate regarding important issues for their children and that it was unlikely they could put their differences aside and work to determine what was best for their children.

The evidence supported this opinion but also showed that his recommendation to use the parenting facilitator and amicus attorney as decision makers was untenable. Mother and Father have been unable to amicably co-parent since their divorce. Even being ordered to communicate through Our Family Wizard and use a parenting facilitator proved fruitless. Furthermore, Father believed the amicus attorney was biased against him and sought her removal from the case multiple times. When Mother and Father did communicate, they often did not agree on an outcome making it impossible for them to jointly make decisions for the children.

The decisions that resulted in the most conflict were those that pertained to the children's education and extra-curricular activities. The evidence also showed that Mother often did not get a response from Father through Our Family Wizard regarding medical appointments and the children's activities because Father chose not to check it often, repeatedly claimed nothing was attached, and insisted on being notified by email or text instead.

Although the final order does not contain a specific best interest finding in the sections that limit Father's rights, the order provides that "it is necessary for the best interest of the Children that the Court modify its prior orders regarding conservatorship, possession, and access," and that "the modifications of the Amended Final Decree and the 2014 Modification Order set forth in this Final Order are in the best interest of the Children." This language is repeated throughout the order, including in the section pertaining to conservatorship. As a whole, the order shows that the trial court found that limiting Father's rights was in the best interest of the children. Therefore, we cannot conclude that the trial court failed to make the required best interest finding under section 153.072 as Father argues. *See In re C.D.W.*, No. 09-19-00455-CV, 2021 WL 4086229, at *4 (Tex. App.—Beaumont Sept. 9, 2021, no pet.) (mem. op.) (concluding that findings in the modification order that the trial court's orders are in the best interest of the child were sufficient to satisfy section 153.072).

The trial court did not act arbitrarily or unreasonable in naming Mother as the conservator with the exclusive right to make educational, medical, and psychological treatment decisions when the evidence demonstrated continued conflict between the parties due to their inability to reach timely agreements. *See, e.g.*, *Coburn*, 433 S.W.3d at 826–28; *In re C.C.J.*, 244 S.W.3d 911, 924 (Tex. App.—Dallas 2008, no pet.). Similarly, the trial court did not abuse its discretion in suspending Father's right to choose a sport and instead allowing the children, who were both twelve or older by the time of trial, to choose their own sport or athletic endeavor, including dance. We reject Father's contention that such order significantly interferes with his possession and access of the children to the point it denies him access and leaves him without the ability to enforce the order by contempt. *Cf. In re S.V.*, 599 S.W.3d 25, 36–38 (Tex. App.—Dallas 2017, pet. denied) (concluding possession order created the potential for a denial of all father's access to children, without an ability to enforce the order by contempt, where the order provided father the right of possession "only at such times as are agreeable to the child or children"). Both he and Mother are required to take the children to their extra-curricular activities during their possession time. Either parent's failure to do so could be enforced by contempt. There is no evidence that suggests that the children were purposefully wanting to participate in activities that occurred solely during Father's possession; their activities spanned multiple days of the week during both parents' possession schedule. We overrule Father's fourth and fifth issues.

Modification of Child Support

We also review a trial court's child support order under an abuse of discretion standard. *Worford*, 801 S.W.2d at 109. A trial court may modify a child support order if (1) there is evidence of a material and substantial change in circumstances of the child or a person affected by the order, or (2) it has been three years since the order was rendered and the amount of child support differs by either twenty percent or $100 from the amount that would be awarded under the guidelines. TEX. FAM. CODE ANN. § 156.401(a). When the obligor's monthly net resources are greater than the maximum amount of net resources to which the statutory guidelines apply ($9,200 at the time of trial; $8,550 at the time of divorce), the court shall presumptively order an obligor who has three children (two before the court and one other) to pay 22.5% of that amount as child support. TEX. FAM. CODE ANN. §§ 154.125(a), (b), 154.126(a), 154.129(a); *Klages v. Klages*, No. 03-20-00086-CV, 2021 WL 2604064, at *3 n.3 (Tex. App.—Austin June 25, 2021, no pet.) (mem. op.).

Father argues there is no evidence regarding his income from 2012 and, therefore, it is impossible to compare the 2012 amount with the 2020 amount to determine whether there is a material and substantial change justifying modification. However, Mother was not required to show a material and substantial change of circumstances to warrant an increase in child support if three years had passed and the current amount of child support differed by twenty percent or $100 of what

should be ordered under the guidelines. *In re K.M.B.*, 606 S.W.3d 889, 898–99 (Tex. App.—Dallas 2020, no pet.).

Father was ordered to pay $1,875 per month in child support pursuant to the 2012 amended divorce decree. In 2020, the trial court found that Father had two children before the court and another child not before the court, which according to the guidelines would set Father's payment of child support to Mother at 22.5% of his net resources. *See* TEX. FAM. CODE ANN. § 154.129(a). The trial court found that Father's net resources exceeded $9,200 and set his child support payment at $2,070—22.5% of $9,200. The difference between the new amount of $2,070 and the previously ordered amount of $1,875 is $195, which is greater than a difference of $100.

The evidence supports the trial court's finding that Father's net resources exceeded $9,200. Father told the custody evaluator he became a managing director in private wealth management in 2016 and reported an average annual income of $1 million. Mother testified that Father made more than $10,000 a month. Therefore, the trial court had sufficient facts before it to support an increase in child support under section 156.401(a)(2). The amount of support established by the statutory guidelines is presumed to be reasonable, and an order of child support conforming to the guidelines is presumed to be in the best interest of the child. *Id.* § 154.122(a). We conclude the trial court did not abuse its discretion by increasing the amount of monthly child support owed by Father. Father's second issue is overruled.

Award of Attorney's Fees

A trial court may award reasonable attorney's fees and expenses in a suit to modify the parent-child relationship. TEX. FAM. CODE ANN. § 106.002(a); *Lenz v. Lenz*, 79 S.W.3d 10, 21 (Tex. 2002); *In re S.C.*, No. 05-18-00629-CV, 2020 WL 3046203, at *2, *5–6 (Tex. App.—Dallas June 8, 2020, pet. denied) (mem. op.) (citing *In re M.A.N.M.*, 231 S.W.3d 562, 566–67 (Tex. App.—Dallas 2007, no pet.)). The party seeking to recover attorney's fees bears the burden of proof. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484, 498 (Tex. 2019). To recover attorney's fees, a party must present evidence of the particular services performed, when they were performed and who performed them, the reasonable amount of time required to perform such services, and the reasonable hourly rate for each person who performed the services. *Id.* at 498.

Father argues that Mother's attorney's heavily redacted invoices were provided to him less than thirty days before trial and, thus, he had insufficient time and information, due to the redactions, to review the invoices and adequately cross-examine Mother's attorney. Mother's attorney also failed to testify as to the hours worked, the nature of the work performed, and the amount and reasonableness of rates thereby rendering Mother's evidence insufficient to support an award of attorney's fees. We disagree that the evidence is insufficient to support the trial court's award.

Father did not object to Mother presenting evidence on attorney's fees, did not object to the invoices admitted, and did not cross-examine Mother's attorney. Mother's attorney testified that this had been a long and contentious case, with over sixty-seven orders entered since the 2014 modification. The total amount of attorney's fees and expenses incurred was approximately $572,000 from September 2016 through September 2019, and he estimated the total amount through trial would be another $200,000. Mother's attorney further testified that he had been practicing law nearly twenty years and mostly family law for the past ten years. His rate was $400 per hour, which he testified was reasonable for Dallas County, especially in such a complex and involved case, and were necessary to represent Mother.

Although certain entries are heavily redacted in the admitted invoices, there are entries that are not heavily redacted, or not redacted at all, that detail the services performed and amount to more than $300,000 in fees incurred. We conclude that Mother's unchallenged evidence is sufficient under *Rohrmoos* to support her award of attorney's fees. Father's third issue is overruled.

Conclusion

Having overruled each of Father's issues on appeal, we affirm the trial court's September 18, 2020 amended final order in suit for modification.

/Craig Smith/
CRAIG SMITH
JUSTICE

Schenck, J., dissenting.

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF B.M.B. AND K.A.B., CHILDREN	On Appeal from the 302nd Judicial District Court, Dallas County, Texas Trial Court Cause No. DF-11-11126.
No. 05-20-00852-CV	Opinion delivered by Justice Smith. Justices Schenck and Osborne participating.

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

It is **ORDERED** that appellee JENNIFER LANCASHIRE recover her costs of this appeal from appellant DAVID BARNES.

Judgment entered this 10th day of August 2022.