AFFIRMED and Opinion Filed December 30, 2024

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-01104-CV

IN THE INTEREST OF D.N.W., A CHILD

On Appeal from the 196th Judicial District Court
Hunt County, Texas
Trial Court Cause No. 83,885

MEMORANDUM OPINION

Before Justices Pedersen, III, Smith, and Garcia
Opinion by Justice Smith

Mother appeals the trial court's final order in a suit to modify the parent–child relationship in which the trial court appointed appellee Father as the conservator with the exclusive right to designate the primary residence of the child and ordered Mother to pay guideline child support, including retroactive support. In two issues, Mother argues the evidence was factually insufficient to support the trial court's rulings. For the reasons discussed below, we affirm.

Factual and Procedural Background[1]

Mother and Father married in 2007 and had one child together. They divorced in 2017. In the final decree of divorce, the trial court appointed Mother and Father as joint managing conservators of D.N.W., with Mother having the exclusive right to designate the primary residence of D.N.W. and Father having an expanded standard visitation schedule and the obligation to pay $1,250 in child support to Mother each month.

On March 8, 2021, Father filed a petition to modify the parent–child relationship seeking to be appointed the conservator with the exclusive right to designate the primary residence of the child. He alleged that the circumstances had materially and substantially changed since the final decree of divorce and that D.N.W. was now twelve years of age or older and would express to the court her preference as to whom was given the exclusive right to designate her primary residence.

At the temporary orders hearing, the trial court appointed Mother and Father as temporary joint managing conservators with Father having the exclusive right to designate D.N.W.'s primary residence as long as she remained in her school district

[1] Writing this opinion presents an unusual problem because the appellate record is 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.).

until further order of the court or agreement of the parties, thereby switching the primary conservatorship appointment and possession schedules. The trial court also ordered "[t]hat during the pendency of these temporary orders child support payments shall be suspended until such further order of this court." Each party was ordered to "support the child during their periods of possession and access."

The case proceeded to a final trial before the court on Father's petition to modify. As requested, the trial court conducted an in chambers interview with D.N.W., who was fourteen years old at the time. The trial court also heard testimony from Dr. Jill Bennett (the child's therapist), Dr. David Bell (the child custody evaluator), Father, and Mother. Additionally, a preliminary and amended child custody evaluation were admitted into evidence for the trial court's consideration. The trial court granted Father's petition to modify, appointed Father as primary conservator, provided Mother with an expanded standard possession schedule, and ordered Mother to pay child support, including retroactive child support from June 1, 2021, the date of the temporary orders. Mother filed a request for findings of fact and conclusions of law, a motion for reconsideration, and a motion for new trial, which was overruled by operation of law. This appeal ensued.

Findings of Fact and Conclusions of Law

Within her two issues challenging the sufficiency of the evidence to support the trial court's rulings as to primary conservatorship and retroactive child support, Mother also complains about the trial court's failure to file findings of fact and

conclusions of law. She contends that we should abate the appeal to allow the missing findings to be entered.

After the trial court sent a letter to the parties setting out its rulings on Father's motion to modify, Mother filed a request for findings of fact and conclusions of law pursuant to rule 296. *See* TEX. R. CIV. P. 296. Mother did not file a notice of past due findings as required by rule 297. *See* TEX. R. CIV. P. 297 ("If the court fails to send timely findings of fact and conclusions of law, the party making the request *must*, within thirty days after filing the original request, file . . . a 'Notice of Past Due Findings of Fact and Conclusions of Law.'"). By failing to timely file notice of past due findings of fact and conclusions of law, Mother 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); *Burns v. Burns*, 116 S.W.3d 916, 922 (Tex. App.—Dallas 2003, no pet.).

Standard of Review – Sufficiency

We review a trial court's order modifying custody, including the rights and duties of each conservator; 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.); *In re B.M.B.*, No. 05-20-00852-CV, 2022 WL 3226277, at *5 (Tex. App.—Dallas Aug. 10, 2022, pet. denied) (citing *Coburn v. Moreland*, 433 S.W.3d 809, 828 (Tex. App.—Austin 2014, no pet.)). We also review a trial court's child support order under an abuse of discretion standard. *Worford v. Stamper*, 801 S.W.2d 108, 109

(Tex. 1990) (per curiam). 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). To determine whether a trial court abused its discretion in modifying a parent's custody and 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.*

Conservatorship

In her first issue, Mother argues the evidence was insufficient to support the trial court's appointment of Father as the conservator with the right to designate the primary residence of the child. Specifically, she contends that the evidence showed that D.N.W. planned to present false narratives to the trial court, that she was not truthful with her therapist or the child custody evaluator, did not disclose issues that occurred at Father's residence, and fabricated issues about Mother's residence. Mother further argues that neither the therapist nor the child custody evaluator properly investigated or took into consideration the lies and other inappropriate behavior by Father or within his home.

The evidence at trial showed that D.N.W. often lied to Mother. However, neither the child's therapist nor the child custody evaluator believed that the child had lied to them, and it is undisputed that D.N.W. told them she wanted to primarily live with her father.

Dr. Bennett, a counseling psychologist, licensed professional counselor, and licensed marriage and family therapist, testified that she had been D.N.W.'s counselor for four and one-half years—since January 2019. Dr. Bennett treated D.N.W. for anxiety, as well as depression and suicidal thoughts. D.N.W.'s anxiety mainly manifested during transitions between her parents after their divorce. The anxiety was at first more pronounced when she went to her father's house, but over time, it shifted to where she had more anxiety when she was at her mother's house. D.N.W. had also recently shared some upsetting things she heard about her father from her mother.[2] According to Dr. Bennett, Mother had become increasingly concerned with what was being said at Father's house and asked for a referral to a parental alienation specialist; however, D.N.W. did not report any comments being made at Father's house regarding Mother. Dr. Bennett also testified that she had some concern that Mother would file a complaint against her to her licensure board if Mother did not feel like D.N.W. was receiving the appropriate treatment, as Mother had filed a complaint against Dr. Bell, the child custody evaluator.

[2] The allegation that Mother disparaged Father in front of D.N.W. was corroborated by Mother's new stepson.

Dr. Bennett noted that Mother and Stepfather had a lot of concerns about D.N.W. being honest, and D.N.W. admitted to Dr. Bennett she had lied to her Mother. Dr. Bennett did not believe that D.N.W. had lied to her. Overall, Dr. Bennett opined that D.N.W. loved both parents but was more comfortable and less anxious at her father's house. Dr. Bennett did not have any concerns about D.N.W. and Father's relationship; it was "pretty healthy" from what she could tell. On the other hand, D.N.W.'s relationship with her mother was volatile.

Dr. Bell, a psychologist, performed the child custody evaluation in this case. He also prepared a revised evaluation after Mother pointed out certain errors and areas of disagreement in the original evaluation.[3] Dr. Bell recommended that Father be named primary conservator with the exclusive right to establish the residence of D.N.W. and that Mother have a standard possession order. The main concern between D.N.W. and her mother was that her mother questioned her, told her things, or looked into things, which caused her to have anxiety. D.N.W. equated her mother to the FBI. Although Mother asked Dr. Bell to look into certain things concerning Father, he did not find anything that would have an impact on D.N.W. For example, Mother was concerned with Father's drinking and past violence. However, Dr. Bell did not find any records showing such concerns when he ran a background check on

[3] Mother made clear to the trial court her dissatisfaction with the child custody evaluation, including a written objection setting out various documents she alleged the evaluator did not consider or were missing from the report, mistakes in the report, and inconsistencies in how she was treated during the evaluation compared to Father.

Father, and Father denied those allegations. Dr. Bell also received information that Father committed criminal trespass at Mother's work, but it was prior to the divorce and the police report revealed that Father left the premises without incident when asked to do so. Furthermore, alleged emotional abuse of D.N.W. by Father was ruled out during a 2018 investigation by the Texas Department of Family and Protective Services.

When asked, Dr. Bell testified that he did not tell D.N.W. his recommendation or that he had even made a decision, so if D.N.W. told someone that, it was untrue. As to D.N.W.'s issue with lying, Dr. Bell did not believe he questioned her about it because Dr. Bennett was addressing it in counseling sessions. D.N.W. told him she wanted to primarily live with her father. She also told him that she was careful about what she told her mother so as to avoid conflict with her. He was not aware of any lie that D.N.W. told him or the trial court.

Father testified his relationship with Mother was still strained but it was not any worse than it was at the time of the divorce; it also had not improved. Father did not have any reason to believe that D.N.W. lied to him. He felt she told him everything even when he did not want to hear it. When asked if he had discussed the switch of conservatorship with D.N.W., Father responded, "So the answer has to be yes because I'm not here because it's what - - I'm here because she asked for it for four years straight." Father explained that he tries to encourage D.N.W. to respect her Mother and to try again each week. He often stands up for Mother in

that regard. He did not believe that the same was being done by Mother. While they had arguments, he denied ever being aggressive or violent towards Mother. He explained, "If I was aggressive or violent, you know, police would be called immediately, because that's the M.O."; "[e]verything has to be documented."

Father detailed several concerns regarding Mother. He explained Mother had accused him of being the father of another child and had told D.N.W. that child is her brother even though Father did not know the parents of the child until the child was three. Another concern Father detailed were issues with Mother constantly requiring D.N.W. to have her cell phone on and charged when she was at Father's house, which also entailed Mother questioning D.N.W. when that did not happen or continuously texting Father regarding D.N.W.'s phone. Father asked that he and Mother be required to communicate through a messaging service with the court, such as Our Family Wizard or AppClose.

Mother testified she wanted 50–50 custody at a minimum. She described D.N.W. as extremely bright and very outgoing; however, she was concerned about her mental health. Mother believed D.N.W. was a good actress in that she was very bubbly in front of other people but had a very dark spirit when she was by herself or around family. Mother did not want D.N.W. to see Dr. Bennett anymore because Dr. Bennett never told them that D.N.W. was suicidal; she learned that information

during Dr. Bennett's testimony on the first day of trial.[4] Mother believed she and D.N.W. had a good relationship but that it was strained. Mother described her relationship with Father as strained, nonexistent. She testified that she did not discuss issues she had with Father with D.N.W. unless D.N.W. brought up the issue and asked questions.

Mother was concerned with Father being the primary conservator. She explained that D.N.W. was disruptive when she returned from Father's house; she was rude and made false allegations. Her other concerns with Father were his inability to coparent and the way he spoke to her through texts, emails, and phone calls; he either ignored her or attacked her. She was also concerned with whether Father would comply with the court's orders because it was her possession period when the first day of trial concluded and Father would not allow D.N.W. to leave with her. Father did bring D.N.W. to Mother's house after he and D.N.W. went to his attorney's office for a debriefing, but Mother was scheduled to have D.N.W. when school released, which would have been during the hearing. As a result, Mother "filed felony charges" on Father.

Mother also testified that she believed D.N.W. lied to Dr. Bell and Dr. Bennett.

[4] Dr. Bennett did not testify that D.N.W. was "suicidal." Dr. Bennett testified that she administered the Minnesota Multiphasic Personality Inventory to D.N.W. and was shocked by the results. She explained that her "biggest concern was that [D.N.W.'s] depression was really bad and there were suicidal thoughts."

Although Mother raised concerns about Father and believed D.N.W. was lying to those involved in the modification proceeding, both Dr. Bennett and Dr. Bell believed it would be in D.N.W.'s best interest for Father to be named primary conservator. Additionally, D.N.W. expressed a desire to primarily live with Father to each of them, as well as to Father, and presumably to the trial court in chambers. A trial court may modify a conservatorship order if modification would be in the best interest of the child and "the child is at least 12 years of age and has expressed to the court in chambers as provided by Section 153.009 the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child." TEX. FAM. CODE ANN. § 156.101(a)(2). Based on evidence of D.N.W.'s strained relationship with her mother as she grew older and her preference to primarily live with her father, we cannot conclude the trial court abused its discretion in appointing Father as the conservator with the exclusive right to designate D.N.W.'s primary residence. There was sufficient evidence before the court to make such a decision. Therefore, we overrule Mother's first issue.

Child Support

In her second issue, Mother asserts that the trial court erred in ordering retroactive child support for several reasons: (1) there was insufficient evidence, (2) Father did not plead it, (3) Father did not seek it or put on any testimony regarding retroactive child support, and (4) there has been no material and substantial change

since the temporary order's rendition, which did not order either party to pay child support.

In the final order in the modification suit, the trial court found that Mother should pay child support during the pendency of the temporary orders. The trial court ordered her to pay $200 per month in retroactive child support until she paid a total of $29,994.14—$1,066.49 for sixteen months (June 1, 2021, through September 2022 based on her then gross income of $80,000) and $1,293.03 for ten months (October 1, 2022, through July 30, 2023, based on her then gross income of $100,000).

Section 156.401 provides in relevant part that "the court may modify an order that provides for the support of a child . . . if: (1) the circumstances of the child or a person affected by the order have materially and substantially changed since . . . the date of the order's rendition." TEX. FAM. CODE § 156.401(a)(1)(A). We disagree with Mother's interpretation that the applicable date here is the date of the temporary orders. The trial court was not modifying the temporary orders; it was modifying the final decree of divorce. Thus, Father was not required to show that a material and substantial change had occurred since the temporary orders in which the trial court suspended Father's child support payments until further order of the court and ordered each party to "support the child during their periods of possession and access." *Cf. In re Tucker*, 96 S.W.3d 662, 666–68 (Tex. App.—Texarkana 2003, no pet.) (concluding trial court did not abuse its discretion in ordering retroactive child

support payments in modification suit, which changed the primary conservator, even though the parties previously entered into an agreed temporary order in which Mother would not be obligated to pay monthly child support to Father).

Moreover, the trial court had authority to modify the child support for obligations accruing after service of citation, which according to the docket sheet was on March 15, 2021, or after Mother's appearance in the suit to modify, which was when she filed her answer on March 16, 2021. *See* TEX. FAM. CODE § 156.401(b). The effective date of Mother's retroactive support obligation was June 1, which was within the limitations imposed by section 156.401(b) and after Father was given the exclusive right to designate D.N.W.'s residence.

We also disagree with Mother that Father failed to present the issue of retroactive child support to the trial court or that there is insufficient evidence to show a material and substantial change since the time of the divorce. As the Fort Worth court has explained,

> [b]ecause the child[] no longer live[s] with Appellant during the week, she is no longer furnishing the degree of services to the children that she did at the time of the divorce; Appellee, on the other hand, is furnishing more services to the children than he did at the time of the divorce. This, in and of itself, constitutes a material and substantial change requiring the reallocation of financial obligations.

In re Z.B.P., 109 S.W.3d 772, 781–82 (Tex. App.—Fort Worth 2003, no pet.), *disapproved on other grounds*, *Iliff v. Iliff*, 339 S.W.3d 74 (Tex. 2011)). Furthermore, Father testified that child support continued to be withheld after the

trial court issued its temporary orders and after he filed the paperwork to stop the automatic withdrawals from his paycheck; it took sixteen to eighteen months to finally stop. Mother continued to receive child support during that time and would not return the checks to Father. Because he continued to pay child support and also had primary custody of D.N.W. since the temporary orders, Father asked the trial court to award him retroactive child support from May 2021 through July 7, 2023, the final day of trial.

We conclude there was sufficient evidence before the trial court to order Mother to pay retroactive child support during the pendency of the temporary orders and the trial court did not abuse its discretion in doing so. Mother's second issue is overruled.

Conclusion

Having concluded the evidence was sufficient to support the trial court's rulings on Father's petition to modify the parent–child relationship, we affirm the trial court's October 20, 2023 final order in this modification suit.

/Craig Smith/
CRAIG SMITH
JUSTICE

231104F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF D.N.W., A CHILD,	On Appeal from the 196th Judicial District Court, Hunt County, Texas Trial Court Cause No. 83,885.
No. 05-23-01104-CV	Opinion delivered by Justice Smith. Justices Pedersen, III and Garcia participating.

In accordance with this Court's opinion of this date, the trial court's October 20, 2023 final order in appellee LESTER DONELL WRIGHT, JR.'s suit to modify the parent–child relationship is **AFFIRMED**.

It is **ORDERED** that appellee LESTER DONELL WRIGHT recover his costs of this appeal from appellant HEIDI REBECCA RICHARDS.

Judgment entered this 30th day of December 2024.