

In The

Hourteenth Court of Appeals

NO. 14-09-00455-CV

IN THE INTEREST OF R.K.B. AND K.E.B., Children

On Appeal from the 309th District Court Harris County, Texas Trial Court Cause No. 2003-05688

MEMORANDUM OPINION

Vanessa Thornton ("Vanessa") appeals from a modification in a suit affecting the parent-child relationship. In two issues Vanessa challenges the trial court's (1) order appointing William Blackstone the sole managing conservator of the parties' two children, and (2) failure to award her attorney's fees. We affirm.

Background

On September 30, 2003, Vanessa and William Blackstone ("Blackstone") divorced. They had two children during their marriage — R.K.B. and K.E.B. At the time of the divorce, the court ordered that both parties would serve as joint managing

conservators of the children, but the children live with Blackstone. Under the decree, Vanessa had visitation with the children every other weekend from Thursday night to Monday morning.

Following Vanessa and Blackstone's divorce, Vanessa married Brian Thornton ("Brian"). Vanessa also has had two children, a boy and a girl, since her divorce from Blackstone, however, they are not Blackstone's children and do not share the same father.

Four years after his divorce from Vanessa, on October 31, 2007, Blackstone filed a petition to modify the parent-child relationship. In his petition, Blackstone sought custody of the children and requested the court order limited access for Vanessa. Blackstone alleged that the children's environment with Vanessa "may endanger their physical health or significantly impair their emotional development." Specifically, Blackstone alleged that Vanessa engaged in prostitution and stated in an internet chat room that "she is proud of her profession and would encourage her three daughters to be prostitutes." Blackstone alleged Vanessa left the children unsupervised and potentially exposed the children to a sexually transmitted disease.

Temporary Orders

On December 12, 2007, the trial court held a hearing prior to issuing temporary orders. Blackstone testified that several times the children came home from visitation with their mother in the same clothes they left in, not having brushed their teeth, washed their hair, or bathed. When he asked the children why they had not bathed, washed their hair, or brushed their teeth, they told him their mother could not afford shampoo or toothpaste. Further, according to Blackstone, Vanessa failed to take one of the children to a tutoring session on the weekend she was assigned to do so and Vanessa does not help the children with their homework during her visitation. Carol DeLeon, the children's nanny at the time, corroborated Blackstone's testimony about the condition of the children when they visited their mother. She acknowledged that while Vanessa was married to Brian, the children did their homework, bathed, brushed their teeth, and changed their clothes while visiting their mother. However, she testified that after

Vanessa and Brian separated, the children became more emotional than normal and displayed some behavior difficulties.

As to the children's living situation, Blackstone testified that Vanessa had lived in six or seven different locations in the span of the four years since the divorce, including a period of time in a women's shelter.

Blackstone stated that he decided to move for modification of the decree when he saw Vanessa's website. Though he first met Vanessa when she was dancing at a topless club, he learned that Vanessa advertised on her website as a prostitute. He also discovered a chat room conversation in which Vanessa, using the pseudonym "Browneyedgirl," stated she would encourage her daughters to engage in prostitution. Vanessa did not deny having made this statement, but said she did so in the persona of "Brown Eyed Girl," not as herself. Vanessa did deny that she engages in prostitution, but testified that since she and Blackstone divorced she has engaged in "paid companionship." However, Brian, Vanessa's husband at the time of the hearing, described her profession as "dating for money, escorting, having sex for money, prostituting."

Blackstone asked that the court modify the order to limit Vanessa's visitation pending psychological evaluation. In addition to Vanessa's prostitution, Blackstone was concerned that she is mentally and emotionally unstable.

At the conclusion of the hearing, the court ordered that Vanessa's visitation be supervised through SAFE or another mutually agreed upon supervised visitation program.

The Modification Order

On February 3 and 4, 2009, the trial court received evidence on Blackstone's motion to modify the conservatorship. The Court heard evidence from not only the principals, but also co-workers, nannies, and healthcare professionals. Most of the contentions between the parties were contested in the evidence. At the conclusion of the

hearing, the trial court announced his decision, and later reduced that decision to findings of fact and conclusions of law.

At the evidentiary hearing, Vanessa offered the Court testimony about her work; her financial status; and her efforts with the children. She testified that she had given "sensual body rubs" for money. Upon the 2003 divorce, Vanessa worked for Continental Airlines, and was pregnant with another man's child. When that child was born, Vanessa hired a live-in nanny and maintained her job at Continental for approximately one year. In 2005, Vanessa left her job at Continental and began supporting herself as a "paid companion." At the time of the hearing, Vanessa stated she was working as a massage therapist for Massage Envy.

Vanessa testified she earns \$600 to \$700 per month, is on food stamps, and having trouble financially supporting her other two children. However, she acknowledges that she received an inheritance of \$175,000 in 2008, which she has completely spent on, among other things, a \$20,000 donation to her church and a \$500 contribution to the Attorney General of Philadelphia to advance his efforts regarding the citizenship of President Obama.

She further testified that her sister is a prostitute, but that she does not want her children around any prostitutes and that she frequently attended weekend church retreats at which she taught teenagers to abstain from premarital sex.

Blackstone again testified that he filed the motion to modify the possession order out of concern for the environment in which Vanessa placed the children. Blackstone's concerns were two-fold. He was first concerned about Vanessa's profession and her stated willingness to encourage her daughters in that profession. Further, he was of the opinion that she suffered from a psychiatric disorder and was in need of treatment. Blackstone asked the court to order a psychiatric evaluation and supervised visitation for Vanessa.

Juanita Bell acted as the supervisor for several of Vanessa's visits with her children, pursuant to the court's temporary orders. She described Vanessa's home as nice, clean, and well-kept. Although she stated that she saw no danger to the children if the court ordered unsupervised visitation Bell acknowledged that her last supervised visit with Vanessa and the children was so alarming that she called the police. According to Bell, Vanessa had become enraged because she expected the visit to be unsupervised. When cautioned by the police at that time that one of the options was for him to take the children to Child Protective Services (CPS), Bell relays that Vanessa responded that she would rather her girls go to foster care than go back to their father.

Harriet McCoon, a therapist, testified that Vanessa was referred to her after a domestic violence incident with the father of her youngest child. McCoon testified that Vanessa was depressed, had been involved in obsessive or addictive relationships, but seemed to be working toward improving her circumstances and she seemed like a good mother. McCoon testified that she wasn't concerned for the children's safety if unsupervised with Vanessa, but she was concerned about Vanessa's reports of "some of the things [her husband] had done to the children." McCoon did recall that Vanessa stated she wanted to see Blackstone die a slow, painful death but Vanessa said she was angry when she said it.

Ultimately, on April 24, 2009, the trial court signed an order modifying the parent-child relationship in which he determined that Blackstone should be sole managing conservator of the children and ordered that Vanessa have limited periods of possession with the children as long as she attended two appointments per month with a designated psychiatrist. The court ordered that each party pay his or her own attorney's fees and that Blackstone pay the amicus attorney's fee. Vanessa appeals from that order.

Standard of Review

Because a trial court has broad discretion to decide the best interest of children in family law matters such as custody, visitation, and possession, we review a decision to modify conservatorship for a clear abuse of that discretion. *See Gillespie v. Gillespie*,

644 S.W.2d 449, 451 (Tex. 1982). A trial court abuses its discretion when it acts arbitrarily or unreasonably, or when it clearly fails to correctly analyze or apply the law. *See In re D.S.*, 76 S.W.3d 512, 516 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Under the abuse-of-discretion standard, legal and factual sufficiency of the evidence are not independent grounds of error, but are factors in assessing whether the trial court abused its discretion. *See id.*

In her first issue, Vanessa asserts the trial court abused its discretion in modifying custody and granting sole managing conservatorship to Blackstone. A trial court may modify a conservatorship order only if modification would be in the children's best interest and "the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed" since the previous order. Tex. Fam. Code Ann. § 156.101.

In deciding whether a material and substantial change of circumstances has occurred, a trial court is not confined to rigid or definite guidelines. *In re A.L.E.*, 279 S.W.3d 424, 429–30 (Tex. App.—Houston [14th Dist.] 2009, no pet); *In re Z.B.P.*, 109 S.W.3d 772, 779 (Tex. App.—Fort Worth 2003, no pet.). Such a change may include (1) the marriage of one of the parties, (2) poisoning of a child's mind by one of the parties, (3) change in the home surroundings, (4) mistreatment of a child by a parent or stepparent, or (5) a parent's becoming an improper person to exercise custody. *In re A.L.E.*, 279 S.W.3d at 428–29.

The best interest of the children is always of paramount importance in making any custody determination. *See* Tex. Fam. Code Ann. § 153.002; *In re V.L.K.*, 24 S.W.3d 338, 342 (Tex. 2000). A court may use the following non-exhaustive list of factors to determine the children's best interests: (1) the desires of the children; (2) the emotional and physical needs of the children now and in the future; (3) the emotional and physical danger to the children now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the children; (6) the plans for the children by the individuals seeking custody;

(7) the stability of the home; (8) the acts or omissions of the parent that may indicate that the existing parent-child relationship is not proper; and (9) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). In the context of custody modification, other factors to be considered include the children's need for stability and the need to prevent constant litigation in child-custody cases. *In re V.L.K.*, 24 S.W.3d at 343.

Change in Circumstances and Best Interest of Children

In its findings of fact,¹ the trial court found there had been a material and substantial change in the circumstances of the children and Vanessa since the date of the divorce. Specifically, the court found that Vanessa is in the commercial sex business, has expressed an intention to introduce the children to the commercial sex business, shown a propensity for volatile behavior, and a habit of making disparaging remarks about Blackstone. The court further found, among other things, that Vanessa's conduct and actions present a real and immediate threat to the safety and welfare of the children. The court concluded that Blackstone should be appointed sole managing conservator of the children and that Vanessa should have possession of the children every Sunday. Vanessa may maintain unsupervised possession as long as she attends two appointments per month with an appointed therapist. Blackstone was ordered to pay the therapist's fees.

With regard to a material and substantial change in circumstances of the children and Vanessa, the evidence at the hearings showed that at the time the parties divorced, Vanessa had two children and worked for Continental Airlines. At the time Blackstone filed the motion to modify, Vanessa had four children and testified she was having difficulty taking care of the two children who lived with her. The evidence supported the court's finding that Vanessa was engaged in the commercial sex business and that she was willing to encourage her daughters in that business if they expressed an interest in it.

Appellee argues that the findings attached to appellant's brief should not be considered. On February 3, 2011, this court ordered the record supplemented with the trial court's findings of fact and conclusions of law. The record was supplemented February 16, 2011 with the trial court's signed findings; therefore, we will consider them as a part of our record.

Vanessa further testified that, after spending or giving away a \$175,000 inheritance within less than two years, she was dependent on food stamps and only earned approximately \$600 to \$700 per month. Blackstone testified that Vanessa made threats to him on the telephone and told him she wished he were dead. There was evidence that Vanessa made the children aware of her threats.

With regard to the best interest of the children, the record does not contain any information about the desires of the children. The record reveals, however, that the trial court interviewed the children, but to encourage them to speak freely, did not transcribe the interview. Blackstone presented evidence that he feared his children would be subject to emotional and possible physical danger in that Vanessa was willing to encourage them to enter the commercial sex business. Vanessa was married to another man and in the process of a divorce from him at the time Blackstone sought modification. Vanessa testified she had been physically abused by her second husband. Vanessa moved several times after the divorce and was unable to support herself and her children financially.

On this record, we find the trial court had sufficient evidence upon which to exercise its discretion. Further, the trial court did not err in its application of this discretion. The record supports the trial court's findings and its conclusion that modification is in the children's best interest and that there has been a material and substantial change since the divorce. Appellant's first issue is overruled.

Attorney's Fees

In her second issue, appellant contends the trial court erred in denying her request for attorney's fees. The trial court ordered that each party pay his or her attorney's fees and that Blackstone pay the amicus attorney's fee. Appellant argues that while "not without resources" she was "clearly in an unequal posture financially" and is entitled to an award of attorney's fees despite not prevailing at trial. Appellant cites this court's opinion in *Roosth v. Roosth*, 889 S.W.2d 445, 455 (Tex. App.—Houston [14th Dist.] 1994, writ denied), for the proposition that attorney's fees can be awarded to an unsuccessful party in a suit involving the parent-child relationship.

Although trial courts have broad discretion in awarding attorney's fees under the Texas Family Code, this discretion is not absolute, and there must be a finding of good cause before an unsuccessful party may recover attorney's fees. *See London v. London*, 192 S.W.3d 6, 19 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). In this case, there is no finding of good cause, nor is there evidence in the record justifying an award of attorney's fees to appellant. Therefore, the trial court did not abuse its discretion in determining that each party pay his or her attorney's fees. Appellant's second issue is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Panel consists of Justices Anderson, Seymore, and McCally.