Affirmed and Memorandum Opinion filed May 3, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00925-CV

IN THE INTEREST OF T.B., A CHILD

On Appeal from the 387th District Court
Fort Bend County, Texas
Trial Court Cause No. 12-DCV-198516

M E M O R A N D U M O P I N I O N

After their relationship dissolved, appellant, Candus Jack ("Candus"), and appellee, Montria Brown ("Montria"), each filed a petition, seeking to be appointed the joint managing conservator of their minor son, T.B., with the exclusive right to designate the child's residence and make educational and medical decisions. Over multiple days during April to July 2014, the trial court conducted a bench trial on the counter-petitions. Montria appeared pro se, Candus was represented by counsel, and an amicus appeared on behalf of T.B. and, in effect, argued in favor of Montria's petition.

On July 16, 2014, the trial court signed a final order, appointing both parents as joint managing conservators and giving Montria the exclusive right to (1) designate T.B.'s primary residence within Fort Bend or contiguous counties, (2) consent to medical, dental, and surgical treatment for the child, and (3) make decisions concerning the child's education. In three appellate issues, Candus challenges the merits of the order and the trial court's failure to make findings of fact and conclusions of law. We affirm.

I. FAILURE TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW

We will first address Candus's second issue complaining that the trial court failed to file findings of fact and conclusions of law and requesting that we abate and direct the trial court to file them. Candus timely requested findings of fact and conclusions of law, but the trial court did not file any, as required. *See* Tex. R. Civ. P. 296, 297. Thus, Candus was required to file a "Notice of Past Due Findings of Fact and Conclusions of Law" within thirty days after the original request, which would have extended the period for the court to file findings and conclusions. *See id.* 297. Our record does not reflect that Candus filed the requisite notice. Thus, Candus waived the right to complain on appeal that the trial court failed to file findings of fact and conclusions of law. *See Curtis v. Comm'n for Lawyer Discipline*, 20 S.W.3d 227, 232 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citing *Las Vegas Pecan & Cattle Co. v. Zavala Cnty.*, 682 S.W.2d 254, 255 (Tex. 1984)). We overrule Candus's second issue, and, as set forth below, we will evaluate her substantive contentions under the standard applicable when the trial court does not file findings of fact and conclusions of law.

II. CHALLENGE TO THE TRIAL COURT'S RULINGS

In her first and third issues, Candus contends the trial court abused its discretion by giving Montria the exclusive right to designate T.B.'s primary

residence, make decisions concerning the child's education, and consent to medical, dental, and surgical treatment for the child. We will consider these issues together because the evidence is overlapping pertinent to both issues.

A. Standard of Review and Applicable Law

When a trial court appoints joint managing conservators, it must (1) designate the conservator who has the exclusive right to determine the primary residence of the child, (2) specify the rights and duties of each parent regarding the child's physical care, support, and education, and (3) allocate between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent, including the right to consent to medical and dental care and make decisions concerning the child's education. *See* Tex. Fam. Code Ann. § 153.134(b)(1), (2), (4) (West 2014); *Id.* § 151.001(a)(6), (10) (West 2014). "The best interest of the child shall always be the primary consideration" of the trial court in determining conservatorship issues. *Id.* § 153.002 (West 2014). Texas public policy is to (1) assure a child will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child, (2) provide a safe, stable, and nonviolent environment for the child, and (3) encourage parents to share in the rights and duties of raising their child after the parents have separated. *Id.* § 153.001(a) (West 2014).

We review a trial court's decision regarding conservatorship issues for abuse of discretion. *Flowers v. Flowers*, 407 S.W.3d 452, 457 (Tex. App.—Houston [14th Dist.] 2013, no pet.). A trial court abuses its discretion if it acts arbitrarily or unreasonably or without reference to any guiding rules or principles. *Id.* Under the abuse-of-discretion standard, legal and factual insufficiency are not independent grounds of error but rather are relevant factors in assessing whether the trial court abused its discretion. *Id.* There is no abuse of discretion as long as

some evidence of a substantive and probative character supports the trial court's exercise of its discretion. *Id.* We defer to the trial court's resolution of underlying facts and its determinations regarding witness credibility because it was able to observe the witnesses and sense the "forces, powers, and influences" present in a custody case that may not be apparent from merely reading the appellate record. *See In re A.L.E.*, 279 S.W.3d 424, 427 (Tex. App.—Houston [14th Dist.] 2009, no pet.). When the appellant does not properly request findings of fact and conclusions of law and none are filed, we infer the trial court made all necessary findings of fact to support its judgment. *See Curtis*, 20 S.W.3d at 231.

A court may use the following non-exhaustive list of factors to determine the child's best interests: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child 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 child; (6) the plans for the child by the individual 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).

B. The Evidence

T.B. was born in January 2010 to the parties, who had a relationship but never married. Montria also had a teenage son and shared custody with that son's mother. Since before T.B.'s birth, Montria has worked for the Fort Bend Independent School District as an athletics coach and a diagnostician for special-needs children. When T.B. was born, Candus worked in the clothing business, but by the time of trial, she had begun working as a teacher and was pursuing a

doctorate degree. According to Montria, Candus moved into his house before T.B.'s birth, and after the birth, Montria spent considerable time caring for T.B. while Candus worked, or Montria's mother provided such care when both parties were working. In contrast, Candus testified she did not move into Montria's home until T.B. was six months old. According to Candus, she had always been the primary caregiver while Montria was busy with work.

The parties' relationship eventually deteriorated although the evidence was conflicting regarding the reasons. Montria testified Candus had emotional issues which included rage and angst that she had difficulty finding a job outside the clothing business. Montria described an incident when Candus punched a hole in a door and struck Montria in the head and an incident when Candus struck Montria on the chest where he already had a cracked sternum from an accident, and kicked his groin. Candus denied such behavior and maintained Montria was abusive, including occasions when he pushed her head into a sofa and threw soup in her face. Candus also claimed that Montria had relationships with other women during the parties' relationship. For example, Montria's former girlfriend testified that she and Montria continued a relationship which resulted in pregnancy and she aborted at Montria's insistence. At trial, Montria denied all of those allegations. But, it is undisputed that one night, that woman went to the parties' home after informing Candus of the allegations. Both women testified that Montria attacked the former girlfriend while Montria was holding baby T.B., whereas Montria claimed that the woman attacked him. The woman agreed at trial that the police classified her as the perpetrator although no charges were pursued.

An incident in April 2012 resulted in the end of the parties' relationship and initiation of the present suit. Montria was out with friends one night and missed calls from Candus, which upset her. Montria testified that when he got home,

Candus had removed the front door knob and then cursed and physically attacked Montria when he tried to get into bed but stopped when T.B., who was sleeping in the room, whined. In contrast, Candus testified that Montria attacked her by attempting to drag her out of bed and she was merely defending herself. Candus called 911, but the responding officer classified Candus as the perpetrator although Montria did not pursue charges. According to Montria, Candus heard Montria tell the officer that Montria wanted to end the relationship and be free to raise his sons.

Montria spent that night at his sister's home, and when he returned home the next day, Candus and T.B. were gone. Montria testified he did not see T.B. for over two months and Candus and her family refused Montria's repeated requests to reveal the child's location. Candus acknowledged that during that period, she moved T.B. around to various places including Beaumont (where her family lived), a hotel, a friend's apartment, and then her own apartment. Candus did not acknowledge directly hiding T.B. from Montria but admitted to actions which hindered Montria from seeing T.B., such as insisting Montria visit in Beaumont or at a police station and rarely answering his calls. Candus excused such actions as necessary for removing T.B. from an atmosphere in which his parents fought.

Montria filed his original petition in the present case about a week after Candus left with T.B. Candus filed her counter-petition about six weeks later. Montria testified that eventually the trial court ordered Candus to identify T.B.'s daycare center and Candus said that she would just move T.B. again if she had to reveal his location but the trial court forbade her from doing so.[1] Pursuant to Candus's instructions, the daycare center would not allow Montria to see T.B. until one worker permitted a visit, during which T.B. was sick and clung to Montria.

[1] The clerk's record does not contain such an order although the docket sheet indicates the trial court granted some sort of injunctive relief in early June 2012. Nonetheless, Montria testified regarding the substance of the relief.

In mid-June 2012, the trial court approved an agreement between the parties, and later signed various temporary orders, allocating possession of T.B., so Montria has had continual periods of possession since he located the child. The trial court also eventually signed temporary orders appointing both parties as joint managing conservators with Candus having the exclusive right to designate T.B.'s primary residence and requiring Montria to pay child support, while the counter-petitions were pending.

In the latter part of 2012, Montria became concerned that T.B.'s speech was not sufficiently developed for his age, T.B. engaged in unusual behavior such as flapping his hands and staring at ceiling fans, and he was aggressive with peers. T.B.'s pediatrician referred him to the Early Childhood Intervention ("ECI") program. T.B. was also examined by a neurologist, who opined that the child met the criteria for "expressive receptive language disorder" and "pervasive developmental disorder-not otherwise specified" and recommended further assessment and therapy. Candus refused to attend the ECI testing because it was conducted at Montria's home. Candus complained that Montria refused to allow the testing at a neutral location, but Montria explained that the program wanted to test in a typical environment for T.B. Montria's evidence reflected that the testing determined T.B. had speech and cognitive delays and that T.B. received ECI services. T.B. was eventually referred to Fort Bend I.S.D. to be evaluated for special education because he would age out of his existing services when he turned three, in January 2013.

Candus kept delaying consent for the special-education evaluation, so the amicus obtained a court order for it to proceed. Candus maintained she wanted to investigate other options although Montria emphasized that the evaluation needed to occur before T.B.'s third birthday so that he could transition from the existing

services to a preschool program. Pursuant to an evaluation in January 2013, in which both parents participated, a team of specialists with the school district determined that T.B. met the criteria to receive special education for autism and a speech impairment. At a meeting, both parents agreed that T.B. would participate in an afternoon preschool program designed to address his disabilities.

The plan was for each parent to handle transportation to the school on that parent's possession days. However, shortly before the start date, Candus informed the school that she was declining the services and did not take T.B. the first few days, when she had possession, but Montria took T.B. on Montria's possession days. Montria testified that the amicus therefore sought court intervention which resulted in T.B. attending the program.[2] At some point, Candus's work schedule made it difficult for her to provide transportation, so Montria assumed responsibility for all the transportation.[3] Between at least the start of the 2013-2014 school year and the time of trial (a nine-month period), Montria (or his mother or girlfriend when he was unavailable) had retrieved T.B. from daycare at lunchtime, taken him to school, and later taken him back to the daycare (on Candus's possession days) or Montria's house (on his possession days).[4] Montria testified he has noticed much progress in T.B. through the program and that a re-evaluation by the school district in January 2014 confirmed that progress, but T.B.

[2] The clerk's record contains the amicus's motion requesting an order that Candus transport T.B. to the program or an order permitting Montria or his mother to provide the transportation on Candus's possession days. The record does not contain any resulting order although the docket sheet reflects there was an agreement between the parties relative to the program. Regardless, Montria's testimony indicated that court intervention resulted in T.B. attending the program, whether through a formal order or some type of agreement.

[3] Again, the clerk's record does not contain any such order, but Montria's testimony indicated the arrangement was changed through court intervention.

[4] At one point, Montria indicated this arrangement was in effect from the start of the program, but, at another point, he indicated this arrangement began in September 2013. Regardless, Montria had handled all of the transportation for at least the 2013-2014 school year.

still has not met all of the goals. T.B. was set to age out of the preschool program at the end of the 2014-2015 school year, during which he would turn five, and he must then be evaluated for special education beyond preschool.

Candus admitted at trial that she does not believe T.B. has disabilities. Her position overall was unclear. At times, she suggested T.B. never had disabilities. For example, Candus has accused Montria of conspiring with the school-district professionals, as his colleagues, and claimed she agreed to T.B.'s participation in the program only because it would not "hurt" him. At other times, Candus suggested that if T.B. once had disabilities, he no longer does because of his progress through the program. Candus testified that in March 2014 (about a month before trial began), she took T.B. back to the neurologist who examined him in 2012 and that doctor said the child does not have autism. The trial court excluded as hearsay a purported letter from the doctor stating "there are no concerns for" autism. At trial, Montria expressed concern that Candus has never observed T.B. in his program to learn the exercises necessary for improving T.B.'s speech and behavior, which Montria performs with T.B. Candus claimed her work schedule and court appearances have precluded such observation.

Montria expressed his fear that if Candus permanently gained primary custody, T.B. would not receive the special services he needs—in preschool and beyond—or Montria would have to continually seek court intervention to ensure the services continue. At trial, Candus indicated that if she were given primary custody, T.B. could complete his preschool program. However, Candus also expressed interest in T.B. attending the school where Candus teaches, which does not have a program. Montria suggested that T.B. has been permitted to attend the particular preschool because Montria's home is in Fort Bend I.S.D. but that might change once there is a permanent custody order. Montria's research revealed that

the closest school with such a program in the district where Candus lives is at capacity, so Montria believes Candus has no plan to ensure T.B. continues to participate. Candus was non-committal on whether she would pursue special education for T.B. beyond preschool, suggesting it is not necessary or T.B. will need further evaluation.

Additionally, Montria testified that Candus otherwise lacks urgency regarding T.B.'s health because she has taken him to daycare when he was sick, with conditions such as a sinus infection, bronchitis, and pink eye, and Montria later took him to the doctor. Candus denied such allegations and either claimed T.B. was not sick at those times or she is the one who has primarily taken him to the doctor and Montria began doing so only for purposes of the custody dispute.

Montria also presented evidence of the following behavior by Candus when there have been minor variances or misunderstandings regarding the circumstances for exchanging T.B. for each parent's periods of possession: (1) Candus has taken pictures of Montria at McDonalds (the exchange location when T.B. is not in daycare) when Montria was five minutes late returning the child; (2) another time when Montria's sister took T.B. to meet Candus at McDonalds, Candus photographed the sister's teenage daughter and T.B. and cursed at the sister when she objected to her daughter being photographed; (3) once Candus told Montria to keep the child because Montria was late returning him; (4) one time the parties agreed for Candus to retrieve T.B. at Montria's house because a work conflict meant Candus would be later than their usual exchange time; when Montria and the child arrived slightly after that later time from waiting at a nearby park, Candus had called the police; (5) Candus also called the police one day when she went to retrieve T.B. at daycare but the child was at Montria's mother's house; Candus had an altercation with the mother at the house before the police confirmed it was

Montria's possession day; (6) on another occasion, Candus cursed at Montria and threatened to call the police when there was a miscommunication about the parties' meeting at a certain store (where Montria was purchasing medication for the child) and they went to different stores; and (7) Candus makes disparaging comments about Montria in T.B.'s presence during the exchanges. Montria testified T.B. senses some of the tension caused by Candus's actions and remarks.

Candus took responsibility for the store incident; but, she claimed Montria's sister was the aggressor at McDonalds, or Candus otherwise excused her actions by claiming Montria played "games" and provoked Candus to appear in a negative light during the custody dispute. Candus would not commit to abstain from calling the police in the future. The record contains evidence confirming the amicus became involved on multiple occasions in addressing possession issues (as well as ensuring T.B. participated in the school program), and Candus was repeatedly uncooperative and disrespectful to the amicus. At trial, Candus accused the amicus of creating problems to increase the amicus's fees.

Finally, according to Montria and his older son, Montria is a committed father to both boys, the older son has performed well academically, and the two sons have a strong bond with each other. Montria characterized his home as a stable environment for T.B.: the child has his own room, a backyard, and friends in the neighborhood—the professionals have recommended interaction with peers to improve T.B.'s behavior. At the time of trial, Candus lived in a one bedroom-apartment, and T.B.'s space was a portion of Candus's bedroom although she generally indicated she planned to look for a new home.

C. Analysis

Candus suggests the best-interest factors, *see Holley*, 544 S.W.2d at 371–72, supported her having the exclusive rights the trial court gave to Montria because

(1) T.B. has spent more time with Candus, (2) she has provided the more stable home, (3) she is more attentive to T.B.'s needs, (4) T.B. never had, or no longer has, special needs, (5) Montria has caused communication issues, (6) Montria has been violent toward Candus and his former girlfriend in T.B.'s presence, and (7) Montria engaged in other romantic relationships during the parties' relationship.

Although Candus separately addresses each factor, the evidence overlaps on all factors. In this regard, the trial court was free to believe Montria's version on all disputed matters. *See In re A.L.E.*, 279 S.W.3d at 427. Consequently, evidence of a substantive and probative character supports the trial court's implicit determination that all factors weighed in favor of giving Montria the exclusive right to designate T.B.'s primary residence and to make educational and medical decisions for the child:

- Candus has been abusive toward Montria and his family members in T.B.'s presence, whereas Montria has not been abusive to Candus or other women and did not engage in other romantic relationships during the parties' relationship.
- Candus made it difficult or impossible for T.B. to have contact with Montria (and T.B.'s grandmother who had cared for him) for over two months after the parties' separation and failed to provide the child a stable home during that period.
- Candus is in denial about T.B.'s disabilities and has not ensured his participation in services designed to address them, raising doubts on whether she would pursue those services in the future—consistent with her non-committal attitude at trial. We defer to the trial court's implicit decision to believe the opinion of the school-district specialists that T.B. has such disabilities, rather than Candus's opinion, unsupported by any admissible evidence.[5]

[5] Under her issue challenging the trial court's failure to make findings of facts and conclusions of law, Candus asserts we should consider the neurologist's March 2014 letter purportedly opining "there are no concerns for" autism, which was not admitted at trial. However, Candus presents no substantive argument challenging the trial court's exclusion of the letter as hearsay; Candus merely posits that we should consider the letter because it is relevant

- Montria demonstrated his attentiveness to T.B.'s needs through Montria's persistence in obtaining the special services and other medical care for the child.
- Candus has been responsible for conflicts regarding possession, and her disparaging remarks and over-reactive behavior during exchanges have caused T.B. tension.
- Montria is a loving father to both of his sons, he has been involved in T.B.'s life since birth, and T.B. has a stable environment in Montria's home and interaction with other family members and peers.

Candus also cites several instances in which Montria allegedly engaged in actions showing Candus should have primary custody: (1) Montria allowed non-relatives—his former girlfriend and Candus—to stay overnight in his home while his older son was present, contrary to an order governing custody of that son; (2) Montria violated an order in the present case to communicate with Candus only through the Family Wizard; (3) Montria inflated his health-insurance costs for T.B., to reduce child support; (4) Montria failed to provide T.B.'s health-insurance cards to Candus; and (5) Montria did not include Candus as an emergency contact in T.B.'s school records but listed his current girlfriend without informing Candus.

However, Montria's testimony suggested the following with respect to these allegations: (1) he and his older son's mother agreed to relax the overnight-visit restriction because she was involved with a man whom Montria considered a good father figure for the son, and Montria originally intended to marry Candus when she moved into his home; (2) the insurance-cost information was correct when Montria provided it to his then-attorney although the costs had decreased by the time the attorney presented the information to the trial court; (3) Montria provided health-insurance cards to Candus by leaving them at the daycare and sending copies via text and email; (4) both parties have communicated outside the Family

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and contained in the record. The letter is included in the appellate record because the reporter included all proffered exhibits, whether admitted or not.

Wizard; and (5) the school already had Candus as a contact, and the girlfriend was listed because the trial court permitted Montria to appoint a competent adult to retrieve T.B. when Montria is unavailable; he did not inform Candus out of concern she would call the police when Montria merely wanted to ensure T.B.'s participation in his program. We defer to the trial court's implicit conclusion that Montria's explanations were reasonable and any violations of court orders or misrepresentations to the court were insignificant when weighed against the factors supporting the trial court's rulings.

In summary, the trial court did not abuse its discretion by giving Montria the exclusive right to designate T.B.'s primary residence, to consent to medical, dental, and surgical treatment, and to make decisions concerning T.B.'s education. We overrule Candus's first and third issues.

We affirm the trial court's order.

/s/ John Donovan
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Donovan.