

Affirmed and Memorandum Opinion filed September 26, 2017



In The
Fourteenth Court of Appeals

NO. 14-16-00685-CV

IN THE INTEREST OF E.E., A CHILD

**On Appeal from the 245th District Court
Harris County, Texas
Trial Court Cause No. 2011-24586**

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

The mother of E.E. appeals the trial court's order in a suit to modify the parent-child relationship, raising two issues. First, the mother argues the trial court abused its discretion by naming the mother and father as joint managing conservators but requiring the mother's possession and access to the child be supervised. She argues the access the trial court provided is below the minimum access established by the Family Code's standard possession order. Second, the mother argues the trial court abused its discretion because the order does not identify the evidence presented or the reasons the trial court denied the mother access pursuant to a standard

possession order.

The mother did not provide a reporter's record on appeal and did not follow the procedure under Texas Rule of Appellate Procedure 34.6(c) for a partial-record appeal. Without a reporter's record, we must presume the evidence presented at trial supports the trial court's order. Even without a reporter's record, we may decide issues of law that do not require a review of the evidence. We decide two such issues by concluding that (1) the standard possession order in the Family Code is a guideline from which a trial court may deviate, and (2) the trial court is not required to specify reasons for the deviation if a party does not request that it do so. We therefore affirm.

BACKGROUND

E.E.'s parents divorced in 2011. In the final divorce decree, the court appointed the mother and father as joint managing conservators, with the mother having the right to determine the child's primary residence and the father having the right to visitation. About three years later, the father filed a petition to modify the parent-child relationship, in which he sought the exclusive right to determine the child's primary residence and asked the court to deny the mother access to the child or, in the alternative, require that her visitation be supervised. The father alleged that the mother physically abused E.E., smokes and drinks excessively in the child's presence, has moved around the city and has withdrawn the child from school on several occasions, and has neglected her duties to the child regarding dental and medical care. Additionally, the father alleged that the child is terrified of the mother's current husband, that the child indicated the mother and her husband fight regularly, and that the husband has a criminal record of drug and family violence charges.

After a bench trial, the trial court granted the requested modification. The

order appointed the mother and father as joint managing conservators, granted the father the right to designate the child’s primary residence, and required the mother’s visitation with the child be supervised.¹ The mother appealed the trial court’s order.

ANALYSIS

The mother’s primary complaint on appeal is that the trial court abused its discretion by appointing the mother as a joint managing conservator but requiring that her visitation with the child be supervised. The mother asserts a reporter’s record is not necessary for the issues presented in this appeal. As discussed in Part I below, this issue requires a review of the evidence. Because the mother did not provide a reporter’s record and did not follow the procedure for a partial-record appeal, we presume the evidence presented at trial supports the trial court’s order.

If no reporter’s record is filed due to appellant’s fault, we still may consider and decide issues that do not require the reporter’s record. Tex. R. App. P. 37.3(c). Below, we address the mother’s issues of law that do not require a review of the evidence: (1) whether the standard possession order in the Family Code is a guideline from which a trial court may deviate, and (2) whether the trial court is required to specify reasons for the deviation if a party does not request that it do so. *See Allison v. Serv. Lloyds Ins. Co.*, No. 14-15-00994-CV, 2017 WL 1750111, at *1 (Tex. App.—Houston [14th Dist.] May 14, 2017, no pet.).

I. Without a reporter’s record, we must presume the evidence supports the trial court’s order.

We review a trial court’s order modifying the parent-child relationship for an

¹ The mother filed a motion for new trial. The docket sheet indicates the motion was denied, but there is neither an order in the clerk’s record nor a reporter’s record of a hearing on the motion. Because the docket entry is not a substitute for a written order, we treat the motion as overruled by operation of law. *See* Tex. R. Civ. P. 329b(c); *In re Lovito-Nelson*, 278 S.W.3d 773, 775 (Tex. 2009) (per curiam) (orig. proceeding).

abuse of discretion. *In re P.A.C.*, 498 S.W.3d 210, 214 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without regard to guiding rules or principles. *In re C.A.M.M.*, 243 S.W.3d 211, 214 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). “A trial court does not abuse its discretion as long as some evidence of a substantive and probative character exists to support the trial court’s decision.” *Id.*

The best interest of the child is always the trial court’s primary consideration when determining issues of conservatorship, possession of, and access to a child. Tex. Fam. Code Ann. § 153.002 (West 2014). The trial court considers a number of factors in determining the best interest of the child. *See e.g. Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). A trial court may modify an order that provides for possession of or access to a child if modification would (1) be in the best interest of the child, and (2) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the date of the order. Tex. Fam. Code Ann. § 156.101(a)(1)(A) (West 2014).

The Family Code provides a standard possession order, which is intended to guide the trial court regarding the minimum possession for a joint managing conservator. Tex. Fam. Code Ann. § 153.251(a) (West 2014). If the order varies from the standard possession order, then upon timely written or oral request, “the court shall state in the order the specific reasons for the variance from the standard order.” Tex. Fam. Code Ann. § 153.258 (West 2014). Here, there is no indication in the record the mother requested specific reasons for the variance. When a party fails to request specific reasons for a variance from the standard possession order, we apply the same standard of review as when a party fails to make a request for findings of fact under Texas Rules of Civil Procedure 296 through 299. *In re P.A.C.*, 498 S.W.3d at 217. Therefore, “it is implied that the trial court made all the

necessary findings to support its judgment.” *Id.* This standard of review requires reviewing the record “to determine whether some evidence supports the judgment and the implied findings, only considering the evidence most favorable to the judgment and upholding the judgment on any legal theory supported by the evidence.” *Id.*; *see also Niskar v. Niskar*, 136 S.W.3d 749, 754 (Tex. App.—Dallas 2004, no pet.).

Generally, the appellant has the burden to present a sufficient record on appeal to show error requiring reversal. *Rogers v. Rogers*, No. 01–15–00241–CV, 2016 WL 3162299, at *3 (Tex. App.—Houston [1st Dist.] June 2, 2016, no pet.) (mem. op.). We do not have a record of the evidence presented at the bench trial. Alternatively, an appellant may invoke the partial-record-appeal procedures outlined in Texas Rule of Appellate Procedure 34.6(c). Our record does not contain any written request by the mother for a partial reporter’s record, however, nor does the record reflect that the mother submitted a statement of points or issues to be presented on appeal, as required by Rule 34.6(c). *See Tex. R. App. P. 34.6(c)(1); Bennett v. Cochran*, 96 S.W.3d 227, 229–30 (Tex. 2002) (per curiam). Without a reporter’s record or a statement of issues, we must presume the evidence presented at trial supports the trial court’s grant of the petition to modify and its deviation from the standard possession order. *See Bennett*, 96 S.W.3d at 229–30; *Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 795 (Tex. 1987); *King’s River Trail Ass’n, Inc. v. Pinehurst Trail Holdings, L.L.C.*, 447 S.W.3d 439, 449 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *In re D.A.P.*, 267 S.W.3d 485, 487 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *Long v. Long*, 144 S.W.3d 64, 69 (Tex. App.—El Paso 2004, no pet.).

II. The Family Code’s standard possession order is a guideline, not a legal requirement.

The mother also argues there is an internal conflict in the trial court’s modification order because it appoints her as a joint managing conservator but does not meet the “minimal [legal] requirements” of section 153.316 of the Texas Family Code. This section lays out the general terms and conditions of possession of a child under the Family Code’s standard possession order. Tex. Fam. Code Ann. § 153.316 (West 2014). As noted above, the guidelines in the standard possession order are intended to guide the courts as to the minimum possession for a joint managing conservator. Tex. Fam. Code Ann. § 153.251(a). A trial court may deviate from the standard possession order if it finds doing so is in the best interest of the child. *See In re P.A.C.*, 498 S.W.3d at 216, 219 (affirming trial court’s order that appointed mother as joint managing conservator, but required visitation with child be supervised); *In re C.A.N.M.*, No. 2-04-200-CV, 2005 WL 1356443, at *1-4 (Tex. App.—Fort Worth June 9, 2005, no pet.) (mem. op.) (same).² Thus, the trial court’s order does not present a conflict.

Within the mother’s first issue, she argues that “[t]he order must be specific with terms and conditions of possession so the order will have meaningful effect,” and that this order makes “no effort to [e]nsure appropriate surrender of the child” The Family Code requires that the order specify the times and conditions of possession “unless a party shows good cause why specific orders would not be in

² Section 153.252 of the Family Code provides there is a rebuttable presumption that the standard possession order provides reasonable minimum possession and is in the best interest of the child. Tex. Fam. Code Ann. § 153.252 (West 2014). The father argues this presumption applies only in original suits affecting the parent-child relationship, not modification suits. *See In re C.A.N.M.*, 2005 WL 1356443 at *3. We need not address this argument because whether there is a presumption in favor of the standard possession order in a modification suit does not affect our conclusion that the order does not present a conflict.

the best interest of the child.” Tex. Fam. Code Ann. § 153.006(c) (West 2014); *see In re A.P.S.*, 54 S.W.3d 493, 498 (Tex. App.—Texarkana 2001, no pet.) (noting party offered no evidence to show good cause that specific times and conditions were not in the children’s best interest). As noted above, there is no reporter’s record in this appeal. Therefore, even if the trial court’s order is not specific enough, we must presume the evidence presented at trial supports the order, and that good cause was shown that specific orders would not be in the best interest of the child. *See Simon*, 739 S.W.2d at 795; *Pickens v. Pickens*, No. 12-13-00235-CV, 2014 WL 806358, at *4 (Tex. App.—Tyler Feb. 28, 2014, no pet.) (mem. op.) (concluding evidence presented by a party at trial showed good cause why a specific order would not be in the best interest of the child).

We therefore overrule the mother’s first issue.

III. The trial court did not err by deviating from the standard possession order without stating its reasons.

In the mother’s second issue, she argues the trial court abused its discretion by signing an order that fails to identify evidence presented and the reasons it did not follow the standard possession order, which the mother contends it was legally required to do. As noted above, if the order varies from the standard possession order, a party may request the court to state the specific reasons for the variance. Tex. Fam. Code Ann. § 153.258. Here, the clerk’s record does not contain any written request, and we do not have a reporter’s record to determine whether the mother made an oral request. Therefore, without a request from the mother, we conclude the trial court was not required to identify reasons for the variance. *Id.*; *In re P.A.C.*, 498 S.W.3d at 217; *In re Q.D.T.*, No. 14-09-00696-CV, 2010 WL 4366125, at *6 n.3 (Tex. App.—Houston [14th Dist.] Nov. 4, 2010, no pet.) (mem. op.). We therefore overrule the mother’s second issue.

CONCLUSION

Having overruled the mother's issues on appeal, we affirm the trial court's order.

/s/ J. Brett Busby
Justice

Panel consists of Chief Justice Frost and Justices Jamison and Busby.