Affirmed and Memorandum Opinion filed June 7, 2018.

In The

Fourteenth Court of Appeals

NO. 14-16-00770-CV

IN THE MATTER OF THE MARRIAGE OF MARI G. VELDEKENS AND VICTOR C. VELDEKENS

On Appeal from the 257th District Court
Harris County, Texas
Trial Court Cause No. 2014-60256

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

This is an appeal from a judgment of divorce between Victor Veldekens and Mari Veldekens, who are parents to two children. Victor asks us to consider three issues: (1) whether the trial court erred in finding that 1514 Columbia was owned solely by Mari's separate estate, despite the evidence proving that Mari sold a one-half interest in the property to Victor, under the liberal terms of the parties' premarital agreement; (2) whether the trial court abused its discretion by awarding Mari a judgment for attorney's fees under the parties Premarital Agreement as the

prevailing party in the dispute over the 1514 Columbia property; and (3) whether the trial court abused its discretion in not awarding Victor a standard possession order of their children. We find no error in the trial court's judgment and affirm.

I. Background

On August 25, 2007, Mari and Victor were married. One day earlier, the parties executed a premarital agreement that precluded the acquisition of community property during their marriage. In attached schedules A and B to the premarital agreement, the separate property of Victor and the separate property of Mari, respectively, was identified.

Seven years later, in 2014, Mari filed for divorce, asserting the marriage had become insupportable because of discord in conflict of personalities. Mari and Victor are the parents to two minor children.

On June 1, 2016, in a trial to the bench, the parties stipulated to a joint managing conservatorship with shared rights and duties of their children. The parties also stipulated that there was a premarital agreement, the enforceability of which was not contested. The parties tried issues of child support, Victor's periods of possession with the children, and the ownership of the real property located at 1514 Colombia, Houston, Texas.

On July 1, 2016, the trial court rendered a final decree of divorce. Victor was ordered to pay Mari child support of two thousand dollar ($2,000) per month. The trial court modified the standard possession order ("SPO") by not allowing Victor to have overnight visitations with the children on Thursdays and Sundays during the school year as provided by the SPO. The trial court confirmed 1514 Columbia as Mari's separate property. The trial court found that Victor breached the premarital agreement by raising an unsuccessful claim against Mari's separate property at 1514

Colombia; and, under the terms of the agreement, owed Mari attorney's fees in the amount of six thousand five hundred dollars ($6,500).

Victor filed a motion for new trial, claiming there was legally and factually insufficient evidence to support the judgment of the trial court as it related to the ownership of 1514 Colombia, the periods of possession of the children awarded to Victor, and a judgment of $6,500 in attorney's fees against Victor.

At Victor's request, on August 15, 2016, the trial court signed findings of fact and conclusions of law. Victor did not seek additional or amended findings of fact or conclusions of law. Victor timely appealed.

II. Analysis

In his appeal, Victor raises three issues: (1) whether the trial court erred in finding that 1514 Columbia was owned solely by Mari's separate estate, despite the evidence proving that Mari sold a one-half interest in the property to Victor, under the liberal terms of the parties' premarital agreement; (2) whether the trial court erred in awarding Mari (and not awarding Victor) a judgment for attorney's fees because 1514 Colombia was equally owned by the parties; and (3) whether the trial court abused its discretion in not awarding Victor a standard possession order with elections under the Texas Family Code Guidelines because the court should impose a more specific standard before denying a parent statutorily mandated access to his children and not merely employ the "archaic and undefined" phrase "best interest."

A. The trial court did not abuse its discretion in the division of property.

In his first issue, Victor asserts that the trial court erred in finding that 1514 Columbia was owned solely by Mari's separate estate.

1. Governing law.

In a divorce decree, the trial court must divide the community property "in a

manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." Tex. Fam. Code § 7.001. Among these rights is the right to separate property. Under both the Texas Constitution and the Texas Family Code, a person has a separate-property interest in all property that the person "owned or claimed" before the marriage or acquired during the marriage by gift, devise, or descent. Tex. Const. art. XVI, § 15; Tex. Fam. Code § 3.001. Community property, on the other hand, consists of all of the property, other than separate property, acquired by either spouse during marriage, and all property possessed by either spouse during the marriage or at its dissolution is presumed to be community property. Tex. Fam. Code §§ 3.002, 3.003(a). A litigant can overcome this presumption by tracing property and presenting clear and convincing evidence[1] that it is one spouse's separate property. *Pearson v. Fillingim*, 332 S.W.3d 361, 363 (Tex. 2011).

2. Standard of review.

We review alleged error in dividing marital property for an abuse of discretion. *Aduli v. Aduli*, 368 S.W.3d 805, 819 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *Bell v. Bell*, 513 S.W.2d 20, 22 (Tex. 1974)). The test for abuse of discretion is whether the trial court acted arbitrarily or unreasonably, or whether it acted without reference to any guiding rules or principles. *Knight v. Knight*, 301 S.W.3d 723, 728 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing *Swaab v. Swaab*, 282 S.W.3d 519, 524 (Tex. App.—Houston [14th Dist.] 2008, pet. dism'd w.o.j.)). A trial court's division of property need not be equal and the trial court may consider many factors when exercising its broad discretion to divide the marital

[1] " 'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Tex. Fam. Code § 101.007; *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002).

property, including the spouses' capacities and abilities, benefits that the party not at fault would have derived from a continuation of the marriage, business opportunities, education, relative physical conditions, relative financial conditions and obligations, disparity in age, size of separate estates, the nature of the property, and disparity in income and earning capacity. *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981); *Knight*, 301 S.W.3d at 728. Mathematical precision in dividing property in a divorce is usually not possible. *Murff*, 615 S.W.2d at 700.

"A trial court does not abuse its discretion if there is some evidence of a substantive and probative nature to support the decision." *Knight*, 301 S.W.3d at 728. Under an abuse of discretion standard, the legal sufficiency and factual sufficiency of the evidence are not independent grounds of error, but instead factors used in assessing whether an abuse of discretion has occurred. *See Aduli*, 368 S.W.3d at 819; *Stavinoha v. Stavinoha*, 126 S.W.3d 604, 608 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Zieba v. Martin*, 928 S.W.2d 782, 786 (Tex. App.—Houston [14th Dist.] 1996, no writ)).

In an appeal from a bench trial, we review a trial court's conclusions of law *de novo* and will uphold them on appeal if the judgment of divorce can be sustained on any legal theory supported by the evidence. *See Stavinoha*, 126 S.W.3d at 608; *Hailey v. Hailey*, 176 S.W.3d 374, 383 (Tex. App.—Houston [1st Dist.] 2004, no pet.). An appellate court may not challenge a trial court's conclusions of law for factual sufficiency, but it may review the legal conclusions drawn from the facts to determine their correctness. *Id*.

When the appellate record contains a complete reporter's record, an appellate court reviews the trial court's findings of fact under the same standards for legal and factual sufficiency that govern the review of jury findings. *Reisler v. Reisler*, 439 S.W.3d 615, 620 (Tex. App.—Dallas 2014, no pet.). A legal sufficiency challenge

to the findings of fact fails if there is more than a scintilla of the evidence to support the findings. *Id*. In a bench trial, the trial court acts as the fact finder and is the sole judge of the credibility of the witnesses. *Murff*, 615 S.W.2d at 700; *Hailey*, 176 S.W.3d at 383.

3. Premarital agreement.

Courts interpret premarital agreements like other written contracts. *Williams v. Williams*, 246 S.W.3d 207, 210 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *see also In re McNelly*, No. 14-13-00281-CV, 2014 WL 2039855, at *2 (Tex. App.—Houston [14th Dist.] May 15, 2014, pet. denied). The court's primary concern is ascertaining the intent of the parties as expressed in the instrument. *FPL Energy LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 63 (Tex. 2014); *see also Reeder v. Wood Cnty. Energy, LLC*, 395 S.W.3d 789, 794 (Tex. 2012). We consider the entire writing to harmonize and effectuate all provisions such that none are rendered meaningless. *FPL Energy LLC*, 426 S.W.3d at 63; *see also Williams*, 246 S.W.3d at 210. Contract terms are given their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning. *Reeder*, 395 S.W.3d at 794–95. The parties' intent is governed by what is in the contract, not by what one party contends it intended but failed to say and not by whether the contract was wisely made. *U.S. Denro Steels, Inc. v. Lieck*, 342 S.W.3d 677, 682 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). The court cannot rewrite or add to the contract's language. *Am. Mfrs. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003). Here, the parties stipulate they had a valid premarital agreement.

Bearing in mind these governing principles of law and the discretionary standard of review, we turn to Victor's first issue in this appeal.

4. The trial court did not abuse its discretion in finding 1514 Columbia is Mari's separate property.

In his first issue, Victor argues that the trial court abused its discretion by ignoring evidence demonstrating Mari's sale of a one-half interest in real property located at 1514 Columbia, to Victor. Victor contends that he paid Mari for a one-half interest in the property; there was a sales contract; and a hand-written note acknowledging Victor's one-half interest. Consequently, Victor contends that the evidence is both legally and factually insufficient to support the trial court's "1514 Columbia" findings of fact and conclusions of law, stating that the property belongs solely to Mari's separate estate.

In its uncontested Findings of Fact, the trial court found, in relevant part, the following:

- Mari G. Veldekens acquired Columbia by deed in the year 2001 as a single person.
- Victor Veldekens and Mari G. Veldekens were married on August 25, 2007.
- Columbia was identified in the premarital agreement as Mari G. Veldekens separate property having been owned by her prior to marriage.
- Victor Veldekens and Mari G. Veldekens did not modify the premarital agreement as it relates to the Columbia property.
- Victor Veldekens and Mari G. Veldekens did not make any agreements regarding ownership, conveyance, or characterization of Columbia after the date of marriage.
- The Court finds the parties did not convey or transfer ownership of Columbia during their marriage under the terms of the premarital agreement for such transfers.

In its Conclusions of Law, the trial court found that 1514 Columbia is the separate property of Mari.

As an initial matter, it is presumed that all fact findings needed to support the

judgment were made by the trial judge. *Smith v. Smith*, 22 S.W.3d 140, 149 (Tex. App.—Houston [14th Dist.] 2000, no pet.). After the court files original findings of fact and conclusions of law, any party may file with the clerk of the court a request for specified additional or amended findings or conclusions. Tex. R. Civ. P. 298. "Failure by a party to request additional amended findings or conclusions waives the party's right to complain on appeal about the presumed finding." *Smith*, 22 S.W.3d at 149 (citing *Operation Rescue–National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 937 S.W.2d 60, 82 (Tex. App.—Houston [14th Dist.] 1996), *aff'd as modified*, 975 S.W.2d 546 (1998)).

In this case, Victor did not object to the omission of any finding by the trial court. Similarly, Victor did not request the trial court to include additional or amended findings that identified any missing elements. Consequently, we must presume that every disputed fact was found by the trial court in support of the judgment rendered. *See* Tex. R. Civ. P. 298, 299; *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 252–56 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *see Archer v. DDK Holdings LLC*, 463 S.W.3d 597, 603–04, 609 n.7 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Following this presumption, the trial court could have found that the $50,000.00 Victor gave Mari (as documented by Mari in a spreadsheet) was a gift under the terms of the premarital agreement. Further, the trial court could have believed Mari when she testified that she did not execute a sales contract with Victor for 50% ownership of the property at 1514 Columbia. The trial court also could have rejected Victor's contention that Mari's handwritten note requesting $265 to cover escrow deficiencies and increased taxes and insurance as half owner constitutes an "other written instrument" under the premarital agreement.

The trial court's findings of fact and conclusion of law are supported by the

evidence of record. Under the parties' premarital agreement, Schedule B, 1514 Columbia is Mari's separate property. Under the terms of the agreement, each party's separate property would maintain that character throughout the marriage. Specifically, Stipulation 8 to the agreement provides, ". . . no community property will be created during the marriage." Further, the agreement provides the property of the parties shall not be comingled. Article 3.3 states, in relevant part, "Neither party intends to commingle his or her separate property with the separate property of the other party except when intentionally done in accordance with this agreement. . . ."

Additionally, under Article 10.1 of the premarital agreement, separate property held by title (*e.g.*, 1514 Columbia), could only be conveyed to the other party by a deed, an instrument of conveyance, a document of title signed by the transferring party, or other written instrument indicating the transferring party's intent to transfer any part of his or her separate property. The agreement further provides, "[a]bsent such a . . . instrument of conveyance, or document of title expressly conveying such property, all properties remain in the ownership of the party owning or designated as owning the property as his or her separate property." Here, there was no evidence of a deed, instrument of conveyance, or written agreement conveying any part of Mari's title or loan in 1514 Columbia to Victor. Additionally, Victor has not provided any evidence of a written agreement, signed by both parties, that modified or waived the premarital agreement's terms. Finally, Victor fails to overcome the presumption that he gave Mari money as a gift, rather than for the purchase of 1514 Columbia. Article 11.1(2) of the premarital agreement provides that "any money used for the benefit of the other party will be presumed to be a gift to the other party, as contrasted with a payment for which reimbursement or repayment is later expected, unless the parties agree otherwise in writing."

In sum, Victor failed to demonstrate an abuse of discretion by the trial court in its division of property, specifically in concluding that 1514 Columbia is the separate property of Mari. Victor's first issue is overruled.

B. The trial court did not abuse its discretion in awarding Mari judgment for attorney's fees for Victor's breach of the premarital agreement.

In his second issue, Victor argues that the trial court erred in awarding Mari a judgment for attorney's fees, and in not awarding Victor his attorney's fees incurred, under the terms of the premarital agreement because the 1514 Colombia property was equally owned by the parties' separate estates. Victor does not challenge the amount of the award of attorney's fees.

In its uncontested Findings of Fact, the trial court found as follows:

- The parties had a valid premarital agreement dated August 24, 2007.
- The premarital agreement included a term that provided [i]n part: Section 15.4 "Enforceability: This agreement may be enforced by suit in law or equity by either of the parties or by their heirs, executors, attorneys, or assigns. Each party agrees that, by signing this agreement and accepting any benefit whatsoever under it, he or she is estopped and barred from making any claim of any kind at any time to any separate property or the separate estate of the other party or to any property described in this agreement as being the separate property of the other party. Each party waives his or her right to make claims to any separate property of the other party or to any property designated as belonging to the separate estate of the other party, whether the property is acquired before or after this agreement is signed."
- Victor Veldekens made a claim to the property on Columbia.
- Columbia was listed as a separate property asset of Mari G. Veldekens.
- Mari G. Veldekens defended the claim regarding Columbia.
- Mari G. Veldekens incurred attorney's fees in the amount of $6,500.00 in defending the claim regarding Columbia.

The trial court further found in its Conclusions of Law:

- Victor Veldekens breached the premarital agreement, specifically section 15.4.
- Victor Veldekens made a claim to separate property owned by Mari G. Veldekens.
- Mari G. Veldekens incurred reasonable and necessary attorney's fees in defense of the premarital agreement in the amount of $6,500.00.
- Mari G. Veldekens should have and recover judgment in the amount of $6,500.00 plus interest against Victor Veldekens.

The evidence of record supports the trial court's findings and conclusion that Victor asserted an unsuccessful claim against Mari's separate property, and under the terms of the premarital agreement, Mari should recover her attorney's fees.

Victor has failed to show the trial court abused its discretion in awarding Mari attorney's fees under the terms of the premarital agreement. Appellant's second issue is overruled.

C. The trial court did not abuse its discretion in deciding issues related to possession of the children.

In his third issue, Victor argues the trial court abused its discretion in not awarding Victor a standard possession order. Victor contends "[i]t is well past the time for Texas courts to discard the undefined legal vernacular of 'best interest' in resolving conservatorship issues and set forth viable guidelines for determining when a trial court can strip a parent of its alienable right to statutorily mandated periods of possession with his or her children."

1. General law.

"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." Tex. Fam. Code § 153.002; *In re V.L.K.*, 24 S.W.3d 338, 342 (Tex. 2000); *see also Lenz v. Lenz*, 79 S.W.3d 10, 14–16 (Tex. 2002) (discussing factors often relevant in a best-interest analysis); *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex.

1976) (same). It is the public policy of the state to (1) assure that children 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 or dissolved their marriage. Tex. Fam. Code § 153.001. A trial court has broad discretion to decide the best interest of children in matters involving custody, visitation, and possession. *See, e.g.*, *Allen v. Allen*, 475 S.W.3d 453, 458 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *In re R.T.K.*, 324 S.W.3d 896, 899 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

2. Standard of review.

We review a trial court's determination of custody for an abuse of discretion. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007); *R.T.K.*, 324 S.W.3d at 899. As discussed above, a trial court abuses its discretion when its decision is unreasonable, arbitrary, or without reference to guiding rules or principles. *Id.*; *see also Knight*, 301 S.W.3d at 728. In evaluating a trial court's exercise of discretion, we generally defer to the court's resolution of underlying facts and credibility determinations that may have affected its decision, and we do not substitute our judgment in its place. *See Allen*, 475 S.W.3d at 458. The trial court is best able to observe and assess the witnesses' demeanor and credibility and to sense what may not be apparent merely from reading the record on appeal. *Id*.

With these principles in mind, we turn to Victor's arguments in support of his third issue.

3. The trial court did not abuse its discretion in limiting Victor's possession of the children when school is in session.

Victor argues that the trial court abused its discretion by deviating from the Family Code's standard possession order.

In its uncontested Findings of Fact, the trial court provided:

- Victor Veldekens uses abusive language around the children in the presence of Mari G. Veldekens.
- Victor Veldekens calls the children's mother inappropriate and extremely vulgar names in the presence of the children . . . and including at a deposition being taken in connection with this case as set forth in the record.
- Victor Veldekens becomes more frustrated and abusive toward Mari G. Veldekens the longer the visitation period last.
- Victor Veldekens does not routinely visit with [the] children in his own residence, staying with paternal grandparents 40 miles from school.
- The children do better with shorter periods of visitation with Victor Veldekens.
- Victor Veldekens discusses inappropriate adult conversations around the children including alleged adultery, divorce issues, and marital issues.
- The children have shown to be stressed in their educational environments because of the behavior of Victor Veldekens.
- Victor Veldekens is stressed by getting the children ready for school in the morning.
- Victor Veldekens has, on many occasions, used inappropriate language to the children and to Mari G. Veldekens in the morning before school, and gets angry to the point of slamming doors so hard that dishes have been broken.
- The children are often stressed when Victor Veldekens participates in the morning routine before school.
- Mari G. Veldekens lives and works such that she can take the children to school each morning.
- The children should see their father pursuant to a standard possession order except for Sunday's overnight and Thursday's overnight as provided by the Standard Possession Order.

In its Conclusions of Law, the court determined, in relevant part, the following:

- It is in the best interest of the children that Victor Veldekens have a Standard Possession Order under the Texas Family Code that includes the following specifics:
    - Thursdays during the regular school term from 6—8 p.m.
    - Weekends, during all months, beginning at 6:00 p.m. on Friday and ending at 6:00 p.m. on the immediately following Sunday.
    - All holiday periods of possession should begin at 6:00 p.m. and end at 6:00 p.m.
- Victor Veldekens shall have all other terms and conditions and periods of possession as provided by the Texas Family Code for the Standard Possession Order.
- It is not in the best interest of the children to have overnight visitations with Victor Veldekens on Thursdays and Sundays during the school year for a number of reasons, but most significantly because of the stressful morning environment they are in on school morning if they are going to school while in his possession.

The evidence of record supports the trial court's narrowly tailored findings and conclusions of law, only excluding from Victor's standard possession order, the nights before school mornings. The trial court had ample evidence in the form of trial testimony and as recorded in the deposition of Victor using profane language around the children and calling Mari vulgar, inappropriate names. The evidence of record further demonstrated that Victor's behavior went beyond affecting Mari. Victor's behavior toward and around the children on school mornings stressed the children and affected their educational environment. The evidence further demonstrated that Mari had the ability to handle the children's school-morning routines. Thus, the evidence supported the trial court's exercise of its discretion in imposing the limitation on Sunday and Thursday nights, such that Victor is not in possession of the children on school mornings.

Indulging every reasonable inference that would support the trial court's finding, we conclude that the trial court had sufficient evidence to support its

decision. The trial court did not act unreasonably, arbitrarily, or without reference to any guiding rules or principles by limiting Victor's possession when school is in session; therefore, the trial court did not abuse its discretion. *See J.A.J.*, 243 S.W.3d at 616.

Victor's third issue is overruled.

III. Conclusion

The judgment of the trial court is affirmed.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Donovan, and Jewell.