In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00235-CV

IN THE INTEREST OF K.J.B. AND T.M.B., CHILDREN

On Appeal from the 274th District Court
Comal County, Texas
Trial Court No. C2020-0643C, Honorable Charles A. Stephens II, Presiding

June 16, 2022

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

The dispute at bar arises from a final divorce decree. Mother and Father had two daughters. The latter were nine and four at the time their parents divorced. The decree contained a provision barring both parents from "consuming alcohol during any period of possession of the child or any 12-hour period immediately prior to any scheduled period of possession." Mother found no objection in being so barred. Father did. Thus, we are tasked with answering whether the trial court abused its discretion when requiring the presence of a sober parent during the time he or she possessed the kids. Before rendering its decision, the trial court heard evidence of, among other things, Father's (1) long history of drinking alcohol to excess, (2) operating motorized vehicles while

intoxicated or after drinking alcohol, (3) operating them with his children on board, (4) after separation, returning the children home with alcohol on his breath, (5) consuming an average of twelve to eighteen beers each Friday and Saturday night, (6) drinking alcohol between three to five nights each week, (7) having imbibed prior to scaling a fence, with a beer in hand, to gain access to the home after forgetting the gate passcode, (8) being sufficiently drunk to forgo a bathroom and instead urinate on a floor atop his daughter's shoes, (9) being sufficiently drunk to forget previously made arrangements for his safe return home after an evening of "partying," (10) violating temporary orders obligating him to blow into a Soberlink device, and (11) violating like orders prohibiting him from drinking while possessing the children. According to Father, the restriction at issue is excessive, especially since his conduct had yet to result in physical harm to his offspring. We affirm.[1]

Law

The order in question affects the conservatorship and possession of a child. Thus, the child's best interests are the primary consideration. TEX. FAM. CODE ANN. § 153.002. We also note, though, that any order imposing "restrictions or limitations on a parent's right to possession of or access to a child may not exceed those that are required to protect the best interest of the child." *Id.* § 153.193.

Next, our review of the order at bar occurs under the standard of abused discretion. *Kohutek v. Kohutek*, No. 07-10-0143-CV, 2011 Tex. App. LEXIS 7585, at *10–11 (Tex.

[1] Because this appeal was transferred from the Third Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this Court. *See* TEX. R. APP. P. 41.3.

App.—Amarillo Sept. 16, 2011, no pet.) (mem. op.). Abuse arises when the trial court acts arbitrarily or unreasonably or without reference to controlling rules or principles. *Id.*

To the foregoing, we note that Father characterizes the dispute as implicating an injunction. That is, he deemed himself enjoined from consuming alcohol. Given that framework, the trial court's authority to so restrict him allegedly depended upon proving the traditional elements for obtaining a permanent injunction. They are (1) a wrongful act, (2) imminent harm, (3) irreparable injury, and (4) the lack of an adequate remedy at law. *Pike v. Tex. EMC Mgmt., LLC,* 610 S.W.3d 763, 792 (Tex. 2020). Yet, authority of the sister court from which this appeal was transferred indicates otherwise.

For instance, when reviewing an injunctive order affecting the parent-child relationship, the Austin Court of Appeals said nothing of those traditional elements. *Philipp v. Tex. Dep't of Family & Protective Servs.,* No. 03-11-00418-CV, 2012 Tex. App. LEXIS 2760, at *22–23 (Tex. App.—Austin Apr. 4, 2012, no pet.) (mem. op.). Instead, the child's best interest served as the primary focus. *See id.* at *22. The same court ruled similarly in *Jackson v. Jackson*, No. 03-19-00014-CV, 2020 Tex. App. LEXIS 1960, at *12 (Tex. App.—Austin Mar. 6, 2020 no pet.) (mem. op.), when saying "[t]he district court was charged with deciding, based on the evidence before it, whether the injunction was in Daughter's best interest." Again, it undertook neither discussion nor application of the traditional elements supporting permanent injunctive relief. These opinions and the application of Texas Rule of Appellate Procedure 41.3 require us to reject Father's assertion.

Application of Law

The record contains ample evidence from which the trial court could reasonably conclude that Father consumed alcohol in the children's presence and often to excess. The circumstances described in the opening paragraph evince as much. Other evidence, including photographs, add additional support to that inference. On the other hand, little evidence appears of record illustrating that Father's bouts of inebriation resulted in physical injury or otherwise harmed the children.[2] Yet, as Mother also testified, she was there to assure the safety of the children when Father drank in or away from their presence. Indeed, Father also conceded that because Mother was present to care for the kids, he sometimes would drink one more beer. The divorce ended the presence of that safety measure. More importantly, we encountered nothing of record indicating that Father would have a sober adult present to protect the kids should he decide to imbibe while possessing them.

Providing children with a "safe" and "stable" environment remains an aspect of this State's public policy. *See* TEX. FAM. CODE ANN. § 153.001(a)(2). If past is prologue, as it often is, *see In re A.M.*, No. 07-18-00047-CV, 2018 Tex. App. LEXIS 3688, at *7 (Tex. App.—Amarillo May 23, 2018, pet. denied) (mem. op.), then the record establishes that Father again will drink as he chooses, even until drunk. It also illustrates that he had and has a drinking problem, as voiced by Mother. He sought and seeks the opportunity to continue his journey down that road, irrespective of the presence of another adult to safeguard the children. That dilemma lay before the trial court when called upon to assess the best interests of the children

[2] At this point we say nothing of the affect, if any, of mental images left by experiencing Father's repeated inebriation, which include his urinating on the floor and in one of the daughter's shoes.

We cannot debate that adults are free to consume alcoholic beverages. Nor can we debate that adults lose their personal concept of freedom once they bring children into the world; they assume burdens. The burden imposed by the trial court did not bar Father from drinking in toto. It established a time and place restriction upon one prone to consuming beer three to five times a week, drinking twelve to eighteen beers each Friday and Saturday, and "partying" to inebriation and forgetfulness. Moreover, the imposition depends solely upon his possession of the children. Should he not possess them, he is free to drink. Additionally, materially changed circumstances would enable the trial court to revisit the injunction. *See* TEX. FAM. CODE ANN. § 156.101(a)(1). So, the restriction is not necessarily as immutable as Father posits.

In short, the restriction is nominal in comparison to a parent's obligation to provide a safe and stable environment and the risk posed children in the possession of a single parent known to drink to inebriation. To the question whether a trial court must forgo action until children meet with physical harm from a parent's conduct, we answer "no" under the particular facts here. The trial court fostered the best interests of the children by implementing a measure protecting the children's best interests in a nominally intrusive way. No abuse of discretion occurred.

In arriving at our conclusion, we do not ignore Father's contention that the trial court erred in admitting evidence that, years ago, he was arrested for driving while intoxicated. Assuming the decision to be error, Father also had the burden to establish that it was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment. *See Sky Station Holdings I, LP v. Fid. Nat'l Title Ins. Co.*, No. 03-18-00231-CV, 2019 Tex. App. LEXIS 7020, at *16–17 (Tex. App.—Austin Aug. 13, 2019, no

pet.) (mem. op.). That is, he had to "show that the judgment turns on" the mistake. *Id.* Other than his mere conclusion that admission of the evidence harmed him, neither argument nor explanation was offered to illustrate how the trial court's ruling led to an improper judgment. Thus, he failed to meet the requisite burden, and we overrule the complaint.

The final judgment is affirmed.

Brian Quinn
Chief Justice