In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-22-00081-CV

IN THE INTEREST OF C.R.D., A CHILD

On Appeal from the 237th District Court
Lubbock County, Texas
Trial Court No. 2019-536,284, Honorable Les Hatch, Presiding

September 2, 2022

MEMORANDUM OPINION

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

"There are three sides to every story: your side, my side, and the truth."[1] Parents tell their respective versions, while a trial judge searches for the truth. And, while so searching, the court aims at the best interests of the most innocent bystander, the child. AM contends that the trial court missed the mark when refusing to modify an earlier order affecting the parent-child relationship in the way she sought. Because the resulting decision favored TD, the trial court purportedly abused its discretion by both ignoring

[1] THE KID STAYS IN THE PICTURE (USA Films 2022).

statute and rendering a decision lacking factually sufficient evidentiary support. We affirm.

Background[2]

AM and TD divorced after the former engaged in an extramarital relationship with a married man. Their daughter, CRD, was two years old at that time. The trial court initially appointed both parents joint managing conservators via its divorce decree. Neither were given the exclusive right to designate the child's primary residence, however. Furthermore, the decree incorporated an agreement struck by AM and TD providing for unique periods of visitation, custody, and child support. They found their agreement unsatisfactory, and, eleven months later, both sought to modify the trial court's judgment.

The trial court convened a final hearing on the matter in December of 2021. About six months earlier, AM married CM, the individual with whom she had the affair. He brought to the marriage two children. Thus, at time of trial, the new family included AM, CM, CM's two children, CRD, and a child recently born to AM and CM.

According to the record, the relationship between AM and CM was not without problem. The two argued. And, on two occasions, their arguments resulted in the arrival of police. So too did the couple separate twice. One period lasted about three months; another lasted one night.

Arising from the divorce from his former wife was CM's obligation to verify his sobriety through Soberlink. Allegedly, he was so obliged only when he possessed his children. CM intimated that the device was unnecessary and that he agreed to it simply

[2] Matter included in the "Background" derives from evidence within the appellate record, which evidence the trial court was free to deem credible.

to facilitate disposition of his divorce. Yet, AM allegedly told her former husband that CM "had a drinking problem" and, due to it and other "drama," AM needed a different place to live with CRD. Additionally, words used by either AM or TD to describe CM included "very aggressive," "well trained," and "an intimidating specimen." Apparently, one of CM's jobs involved training police in defensive tactics like "krav" or krav maga.

Admitted evidence further reveals interaction between CM and TD was not without incident or stress. For instance, during a period in which TD had possession of CRD and AM was giving birth to her new son, CM "asked" that CRD be brought to the house to witness the birth. That was followed by a message stating "Baby has arrived. When is [CRD] going to be here[?]" On another occasion, CRD fell and required stitches. She was in the possession of TD's mother at the time and taken to the hospital. TD was told he could phone. When he did, CM answered and said: "I'm in the room with your daughter and [AM]. I have got this under control." Upon TD indicating he simply "wanted to listen to what the doctor" had to say, CM bid TD farewell and disconnected the call. Another instance involved nightly calls between AM and CRD while the latter was in the possession of TD. They allegedly lasted up to an hour and a half. TD viewed the calls as encroaching on his time with the child and apparently commented about them to CRD. As children do, CRD apparently repeated the comment to AM. That purportedly resulted in CM "cussing [TD] out" for fifteen minutes. Also, according to TD, CM once told him that "he [TD] better be scared of him."

We further note a particular topic of concern to TD. It involved the way CM and AM disciplined children. They utilized corporeal punishment. Once CRD arrived at TD's home with bruising on her buttocks. A picture was admitted of record depicting same.

TD likened the shape of the bruising to that of a hand. According to CRD, CM spanked her in a Walmart parking lot. The incident apparently resulted in the trial court issuing a temporary order barring physical discipline. Despite that order, CM and AM continued the practice.

It was this and other evidence framing the parties' requests for modification. The trial court acted, but in a way displeasing to AM. So, she appealed.

Authority

An order modifying conservatorship is reviewed for abuse of discretion. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982); *Nichol v. Nichol*, No. 07-12-00035-CV, 2014 Tex. App. LEXIS 492, at *7 (Tex. App.—Amarillo Jan. 15, 2014, no pet.) (mem. op.). Abuse occurs when the court acts arbitrarily, unreasonably, and without reference to guiding principles. *In re A.D.T.*, 588 S.W.3d 312, 319 (Tex. App.—Amarillo 2019, no pet.). Unless the appellant establishes that the court so acted, we cannot disturb its decision. *In re M.S.F.*, 383 S.W.3d 712, 715 (Tex. App.—Amarillo 2012, no pet.). Furthermore, under the standard of review, the legal and factual evidentiary insufficiency of the evidence are not independent grounds of error but rather relevant components of the overall equation. *In re Vick*, No. 07-18-00037-CV, 2019 Tex. App. LEXIS 8552, at *3 (Tex. App.—Amarillo Sept. 23, 2019, pet. denied) (mem. op.).

As for the law regarding modification of conservatorship, a prior order may be changed if it is in the best interest of the child and the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed.[3] TEX. FAM. CODE ANN. § 156.101(a)(1)(A). For the sake of emphasis, we

[3] Neither AM nor TD question the presence of a material and substantial change in circumstances.

reiterate that the trial court's primary consideration is always the best interest of the child when dealing with issues of conservatorship, possession, and access to the child. *Id.* § 153.002. Though the court may consider the desires of a parent, it is not bound by them. *See In re A.I.F.*, No. 07-17-00464-CV, 2018 Tex. App. LEXIS 3543, at *9 (Tex. App.—Amarillo May 17, 2018, no pet.) (mem. op.) (stating that the best-interest analysis evaluates the best interest of the child, not the parent). Nor must it accept a particular parent's interpretation of the evidence. Rather, it, as factfinder, is free to resolve evidentiary conflicts and make credibility choices as it chooses. *In re U.H.R.*, No. 07-18-00318-CV, 2019 Tex. App. LEXIS 22, at *8 (Tex. App.—Amarillo Jan. 2, 2019, no pet.) (mem. op.). That said, we turn to the complaints before us.

AM initially posits that the trial court failed to make requisite findings of fact supporting the limitations to her "medical and educational rights" regarding CRD. Her contention is rather incomplete given the absence of substantive argument and citation to authority illustrating the legal necessity of such findings. Nevertheless, the trial court found that "there has been a material and substantial change in circumstances since entry of the last order and the prior order has become unworkable under existing circumstances" and "[i]t is in the best interest of the child that the following orders be entered . . . ." Those findings encompass the very criteria needed to legitimately modify a prior order under § 156.101(a) of the Family Code. In other words, they are the ultimate or controlling facts which trigger the court's authority to act. And, only ultimate facts need be found by the trial court. *In re M.O.*, No. 06-19-00004-CV, 2019 Tex. App. LEXIS 5038, at *13 (Tex. App.—Texarkana June 19, 2019, no pet.) (mem. op.) (stating that a trial court is required to make findings only on ultimate or controlling issues). Finally, and assuming

arguendo the existence of a duty to make additional findings, the record fails to disclose that AM requested them. The absence of such a request is fatal to a complaint about missing findings. Simply put, a party is required to file a timely request for findings of fact and conclusions of law. TEX. R. CIV. P. 298.

Next, we address the litany of complaints expressly attacking the trial court's multiple rulings. We begin with that wherein AM asserts it was "wrong and unjust" to not implement "the same holiday schedule as [CRD's] stepsiblings and . . . a more appropriate weekend schedule to be able to spend time with her stepsiblings and halfsibling." This is allegedly so because "it is difficult to cultivate a growing, healthy relationship between [CRD], her stepsiblings, and her halfsibling when she is not on the same schedule." Why the child must be "on the same [visitation] schedule" as her "stepsiblings" to "cultivate" such a relationship went undeveloped, as did the steps already taken by AM to achieve that end but which proved unfruitful.

More importantly, AM's reasoning invites instability into the visitation schedule. Indeed, if the trial court were to accept it, then visitation between TD and his child would require modification whenever visitation between CM and his children was modified. Again, the best interests of CRD controlled, and those best interests include stability. *In re E.D.S.*, No. 14-19-00644-CV, 2021 Tex. App. LEXIS 7078, at *4 (Tex. App.—Houston [14th Dist.] Aug. 26, 2021, no pet.) (mem. op.) (observing the policy concerns introduced in a suit to modify, which concerns include "stability for the child").

Also noteworthy is the evidence of relative instability within the marriage of AM and CM. The couple not only engaged in arguments resulting in the arrival of police but also separated twice. She also voiced the need to her ex-husband to escape the "drama" that

"surrounded" her current husband. The trial court may well have thought it best that the couple stabilize their marriage before coordinating CRD's life around her "stepsiblings." That would serve to enhance CRD's own stability. Given these circumstances, the trial court's opting not to mirror CRD's visitation schedule to that of her "stepsiblings" was and is a reasonable exercise of discretion.

AM next posits that (1) "[i]t is not in the psychological best interest of the child to deny educational rights to [AM], who has had primary custody and care of [the child] since the child's birth and who was the only parent involved in educating the child" and (2) awarding "the exclusive right to Appellee following testimony that he refuses to coparent, is unjust." First, we again note the conclusory nature of her allegations about what is psychologically best for the child. AM did not supplement the proposition with citation to the record. Nor did our search of the record uncover expert or informed testimony discussing what was psychologically best for the child. Second, it is specious to suggest that AM "was the only parent involved in educating the child." That may be true if the idea of "educating the child" referred to homeschooling; AM alone did that. Yet, if the reference alluded to education in general, the trial court had before it uncontested evidence of TD arranging educational opportunities for CRD at a local church child program. He did so to enhance both her social and educational skills by matriculating with other kids her own age.

As for the allegation about TD's refusal to "coparent," we are left to guess at what she meant. If it pertained to education, TD knew AM homeschooled their daughter when in her custody, and we found no evidence of him impeding that effort. On the other hand, the trial court heard TD describe how (1) CM "interfere[d] with [his] ability to parent with"

AM, (2) AM submitting or being "extremely submissive" to CM, (3) CM "takes control of the entire situation," and (4) the "biggest problem in the last year and a half [was CM's] interference." CM allegedly never exhibited the ability "to just stay back . . . and let [TD] and [AM] do the parenting." Rather, as said by TD, CM would "demand" that the group gather to "discuss what's best for" CRD and dictate that "[w]e are going to do this my way." At the very least, this provided the trial court evidentiary basis to conclude that the notion of "no coparenting" did not so much encompass refusal on TD's part but rather AM and CM attempting to control outcomes. Finally, the trial court actually granted both parents "the right to confer with the other parent to the extent possible before making a decision concerning the health, ***education***, and welfare of the child." (Emphasis added). Should TD refuse to discuss the child's educational path with her mother, avenues exist to correct that through judicial intervention.

As for limiting the nightly calls, AM deemed the refusal to permit same improper because it "is especially important to the child's emotional wellbeing to maintain a connection with her siblings while she is not present." Like the others, this argument lacked substantive analysis. Furthermore, only AM deemed necessary nightly calls between mother and child before bedtime. That coupled with evidence of the calls sometimes lasting up to an hour and a half, the extent to which they encroached into the time TD had to share with his daughter, and the rather abbreviated time in which CRD remained in TD's sole possession were indicia permitting the trial court to regulate the nighty disruptions.

The remaining argument of AM concerns the sufficiency of the evidence underlying the trial court's decision. As previously stated, that is not an independent ground for

reversal but rather a consideration in assessing the propriety of the trial court's exercise of discretion. Furthermore, her argument is not founded upon the quantum of evidence supporting the court's decision. Instead, she focuses on TD's credibility. She thinks him to be less than truthful. But, again, credibility choices are not ours to make. They fall within the sphere of authority granted the factfinder, or, in this case, the trial court. And, while the evidence was contradictory, we defer to that court's authority to resolve those conflicts. AM may well believe that TD was less than candid. Yet, the trial court was and is authorized to conclude otherwise. And we cannot deny that TD's testimony, if believed by the trial court, coupled with other evidence of record supported the decision it reached.

As said in the beginning, there are three sides to each story. No doubt, testimony imparted by each witness at bar was colored by the proponent's emotion and interests in CRD. The task fell to the trial court to weigh all that was said, consider whom to believe, compare its determination of the truth to the child's best interests, and make decisions. Under the record before the trial court, we cannot say its decisions under attack here evince an abuse of discretion. We overrule AM's issues and affirm the trial court's Order Modifying Prior Order.

Brian Quinn
Chief Justice