In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-20-00049-CV

IN THE INTEREST OF C.J.S., A CHILD

On Appeal from the 470th Judicial District Court
Collin County, Texas
Trial Court No. 470-52812-2014

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Justice Stevens

MEMORANDUM OPINION

Erika Kennedy appeals the trial court's Order on Motion to Confirm and Clarify Orders in a Parent-Child Relationship (Order on Motion to Clarify) that changed her and Marcus Sallis's expanded possession and access schedule to a standard possession and access schedule and awarded Sallis $6,550.00 in attorney fees.

On appeal,[1] Kennedy contends (1) that the trial court abused its discretion by entering its order without sufficient evidence and (2) that insufficient evidence supports the trial court's attorney fees award. Because we find that the trial court did not abuse its discretion, we will affirm that portion of the trial court's judgment. That said, because factually insufficient evidence supports the attorney fees award, we reverse the award of attorney fees and remand this case to the trial court for further proceedings.

I. Background

On January 31, 2020, the trial court entered an Order in Suit to Modify Parent-Child Relationship (Modification Order), which contained a custom possession order (CPO). The CPO provided, among other things, that Sallis would have the right to possession of C.J.S. beginning every Wednesday at 8:00 a.m. until Friday at 8:00 a.m., and every other weekend beginning Friday at 8:00 a.m. until Monday at 8:00 a.m., and that Kennedy would have the right to possession of C.J.S. beginning every Monday at 8:00 a.m. until Wednesday at 8:00 a.m., and every other weekend beginning Friday at 8:00 a.m. until Monday at 8:00 a.m., with alternating

[1]Originally appealed to the Fifth Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001. We follow the precedent of the Fifth Court of Appeals in deciding this case. *See* TEX. R. APP. P. 41.3.

rights of possession for designated holidays and school breaks.[2] The Modification Order also provided that beginning August 3, 2019,

> if the child, while in . . . KENNEDY's possession, has a total of five (5) unexcused absence[s] or tardies or any combination thereof in a school semester, . . . KENNEDY's periods of possession shall be immediately changed to a Standard Possession Schedule as attached as Exhibit A. The child's school shall determine if an absence or tardy is excused or unexcused.

On April 29, 2020, Sallis filed his Motion to Confirm and Clarify Order in Parent-Child Relationship and Request for Injunction (Motion to Clarify) in which he alleged that, while C.J.S. was in Kennedy's possession, there were five days in which C.J.S. was tardy and two days that C.J.S. had unexcused absences during the 2019 fall semester. Sallis asked the trial court to confirm and clarify that, as a result, the parties' current possession and access schedule was the standard possession schedule attached as Exhibit A to the Modification Order and for injunctive relief and attorney fees. Kennedy filed a general denial in response.

At the hearing on the Motion to Clarify, Sallis testified that he had an official school record that showed that in 2019, C.J.S. was marked tardy on August 23, October 16, November 5, November 12, and December 10. That record also showed that C.J.S. received unexcused absences on October 21 and November 13. Sallis also testified that, on all those dates, Kennedy was supposed to get C.J.S. to school.

Sallis also offered the business records affidavit of Melanie Mans, the custodian of records for Mockingbird Elementary, dated January 30, 2020, with attached attendance records for C.J.S. (the January 30 Attendance Records). According to those records, C.J.S. had four

[2]This was referred to by the parties as a 2/2/5/5 50/50 schedule.

unexcused absences, and he was tardy on five days during the fall semester of 2019. The records also confirmed that C.J.S. was marked tardy and received unexcused absences on the specific days as testified to by Sallis. Sallis also testified about his attorney's efforts to resolve the conflict without going to court, introduced letters sent to Kennedy and her attorney by his attorney, and testified that he had incurred attorney fees of $5,500.00.

Kennedy introduced a business records affidavit of Mans dated June 16, 2020, with attached attendance records for C.J.S. (the June 16 Attendance Records). Although those records showed that C.J.S was marked tardy on August 23 and November 5 and that he had unexcused absences on October 21 and November 13, it did not show that C.J.S. was marked tardy on October 16, November 12, or December 10.

Stephanie Cantu, C.J.S.'s kindergarten teacher for the 2019–2020 school year, testified that, as between the January 30 Attendance Records and the June 16 Attendance Records, she would rely on the latter for her recollection and for accuracy. Cantu testified that, when a child comes in late to the school, they are sometimes sent to the office before they go to the classroom. She did not recognize the January 30 Attendance Records but testified that it might be a report that she does not usually see. She also testified that she can input tardies into the system but that the office personnel also input tardies. Cantu affirmed that she did not have any training or duties to run reports on the attendance systems. She also acknowledged that there were competing systems between her and the office that generate reports and that the January 30 Attendance Records and the June 16 Attendance Records were from two different systems. She reaffirmed that she would rely on the June 16 Attendance Records about absences related to her

students. Although Cantu thought both systems would show the same information on tardies and absences, she did not know if they would.

Kennedy testified that she was involved in getting a business record affidavit from Mockingbird Elementary. She also testified that the only weekdays that she was exclusively responsible for getting C.J.S. to school were Tuesday and Wednesday. Kennedy did not know whether she was responsible for getting him to school on August 30 and October 4, which were Fridays, or on October 21, which was a Monday.

The trial court entered its Order on Motion to Clarify, in which it ordered the parties to operate under the standard possession and access schedule attached as Exhibit A to the Modification Order, awarded Sallis attorney fees of $5,500.00 as part of the Motion to Clarify, and awarded Sallis attorney fees of $1,050.00 as part of the motion to enter.[3]

II. The Entry of the Order on the Motion to Clarify Was Not an Abuse of Discretion

In her first two issues, Kennedy complains that the trial court abused its discretion by entering its Order on Motion to Clarify without sufficient evidence to support the order. Kennedy argues that, because Cantu, who she asserts was an expert, testified that she would rely on the June 16 Attendance Records and because those records were dated later than the January 30 Attendance Records, the trial court should have relied upon Cantu's testimony and the June 16 Attendance Records, rather than Sallis's evidence.[4]

[3]Although the trial court's docket sheet indicates that a motion to sign order, objection thereto, and response to the objection were filed and that a hearing was held on the motion to enter, those documents and the transcript of the hearing are not part of the appellate record.

[4]Kennedy also asserts that she "testified that after [Sallis] obtained the January 13, 2020[,] attendance records there was a hearing with the school administrative staff to correct the attendance records. Subsequently, several unexcused

The appealed order clarified the trial court's prior Modification Order. A trial court's modification order is reviewed for an abuse of discretion. *In re W.C.B.*, 337 S.W.3d 510, 513 (Tex. App.—Dallas 2011, no pet.). "A trial court abuses its discretion when it acts arbitrarily and unreasonably or without reference to guiding principles." *Id.* (citing *In re A.B.P.*, 291 S.W.3d 91, 95 (Tex. App.—Dallas 2009, no pet.)). "In family law cases, the abuse of discretion standard of review overlaps with traditional sufficiency standards of review." *Id.* (citing *A.B.P.*, 291 S.W.3d at 95). "As a result, legal and factual insufficiency are not independent grounds of reversible error, but instead are factors relevant to our assessment of whether the trial court abused its discretion." *Id.* (citing *A.B.P.*, 291 S.W.3d at 95). "To determine whether the trial court abused its discretion, we consider whether the trial court had sufficient evidence upon which to exercise its discretion and whether it erred in its exercise of that discretion." *Id.* (citing *A.B.P.*, 291 S.W.3d at 95).

Kennedy does not state whether the evidence was legally or factually insufficient. Yet, in her prayer, Kennedy asks us to reverse and remand the case. For that reason, we construe her to be complaining of the factual insufficiency of the evidence. *See Peerless Indem. Ins. Co. v. GLS Masonry, Inc.*, No. 05-16-00875-CV, 2018 WL 3491045, at *4 (Tex. App.—Dallas July 20, 2018, no pet.) (mem. op.) ("Because appellants ask us to reverse and remand for a new trial rather than to reverse and render, we construe their issues as factual sufficiency challenges.").

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absences and several tardies and absences were removed after the school did its due diligence." Even so, Kennedy never testified to those matters. Rather, Kennedy's record citation in support of this assertion shows that her attorney made those contentions in an argument to the court. Generally, "an attorney's statements must be made under oath to be considered evidence." *Ugwa v. Ugwa*, No. 05-17-00633-CV, 2018 WL 2715437, at *3 (Tex. App.—Dallas June 6, 2018, no pet.) (quoting *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (per curiam)). Since her attorney's contentions were not made under oath and since there was no indication that he had personal knowledge of the matter, they are not evidence.

"When considering a challenge to the factual sufficiency of the evidence, we consider all the evidence and determine whether the evidence supporting the order is so weak or so against the overwhelming weight of the evidence that the order is clearly wrong and manifestly unjust." *W.C.B.*, 337 S.W.3d at 513 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)). "When the evidence is conflicting, we must presume that the fact-finder resolved the inconsistency in favor of the order if a reasonable person could do so." *Id.* (citing *City of Keller*, 168 S.W.3d at 821). "The trial court does not abuse its discretion if some evidence of a substantial and probative character exists to support the trial court's decision." *Id.* (citing *In re S.E.K.*, 294 S.W.3d 926, 930 (Tex. App.—Dallas 2009, pet. denied)).

Although the trial court recognized Cantu as an expert in teaching, nothing in the record indicates that the trial court recognized her as having any expertise in the administrative functions of education, including the maintenance, generation, and interpretation of attendance records. Rather, her testimony showed that she was unfamiliar with those aspects of education. Cantu recognized that there was a discrepancy between the two sets of records but failed to explain the discrepancy. Further, although she testified that she would rely on the June 16 Attendance Records, the trial court could have concluded that her reliance on them was because she was familiar with that report and was unfamiliar with the report contained in the January 30 Attendance Records. As a result, the trial court, as the fact-finder, could have discounted Cantu's testimony. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986) (trier of fact, presented with conflicting evidence, may believe one witness and disbelieve others, resolve conflicts in testimony of any witness, or accept lay witness testimony over expert testimony).

The trial court could also have reasonably resolved the conflict between the January 30 Attendance Records and the June 16 Attendance Records in favor of the former. The January 30 Attendance Records consisted of nine pages of records with detailed accounting of the daily reports of attendance, absences, and tardies of C.J.S. It also contained copies of excuse letters from a doctor and a dentist, as well as completed school absence notes. In contrast, the June 16 Attendance Records consisted of one blurry page that can best be described as a summary of tardies and absences in which all the writing and dates were blurred and difficult to read.

Finally, the trial court could have reasonably believed Sallis's testimony that Kennedy was responsible for taking C.J.S. to school on the five specific days that he was marked tardy and the specific days he had unexcused absences. Kennedy acknowledged her responsibility for several of the days and could not recall whether she was responsible for several of the other tardies and absences.

Under this record, we find that substantial and probative evidence supported the trial court's decision. *See W.C.B.*, 337 S.W.3d at 513. For that reason, we find that the trial court did not abuse its discretion, and we overrule Kennedy's first and second issues.

III. The Award of Attorney Fees is Not Supported by Factually Sufficient Evidence

Kennedy also complains that there was insufficient evidence to support the trial court's attorney fees award. As with her other issues, Kennedy does not state whether the evidence was legally or factually insufficient. Consistent with her prayer, we construe her to be complaining of the factual insufficiency of the evidence. *See GLS Masonry, Inc.*, 2018 WL 3491045, at *4. "When considering a challenge to the factual sufficiency of the evidence, we consider all the

evidence and determine whether the evidence supporting the order is so weak or so against the overwhelming weight of the evidence that the order is clearly wrong and manifestly unjust." *W.C.B.*, 337 S.W.3d at 513 (citing *City of Keller*, 168 S.W.3d at 822).

To be entitled to a fee-shifting award of attorney fees, there must be a showing that the fee is reasonable and necessary. *Scott Pelley PC v. Wynne*, 578 S.W.3d 694, 704 (Tex. App.—Dallas 2019, no pet.) (citing *Rohrmoos Venture*, 578 S.W.3d 469, 487 (Tex. 2019)). "In this determination, 'the starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts.'" *Id.* (quoting *Rohrmoos*, 578 S.W.3d at 498) (citing *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012))).

> Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services.

Rohrmoos Venture, 578 S.W.3d 469, 498 (Tex. 2019) (citing *El Apple*, 370 S.W.3d at 762–63).

Here, Sallis testified that he had incurred $5,500.00 in attorney fees and testified that his attorney had written several letters to opposing counsel in an attempt to resolve the dispute before his attorney filed the Motion to Clarify. There is also evidence in the record that Sallis's attorney filed several additional pleadings and attended at least one hearing on the Motion to Clarify. As a result, there was some evidence of the particular services performed, who performed those services, and around when the services were performed. That said, there was no

evidence of the reasonable amount of time required to perform the services or the reasonable hourly rate for each person performing such services.

Based on this record, we find that factually insufficient evidence supported the trial court's attorney fees award. As a result, we sustain this issue.

IV. Conclusion

For the reasons stated, we reverse that portion of the trial court's order awarding attorney fees and remand this case to the trial court for a redetermination of attorney fees. In all other respects, we affirm the trial court's order.

Scott E. Stevens
Justice

Date Submitted: March 24, 2021
Date Decided: April 20, 2021