TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00502-CV

Tammie Cande Philips Filla, Appellant

v.

Chad Lee Filla, Appellee

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 425TH JUDICIAL DISTRICT NO. 07-582-F425, HONORABLE BETSY F. LAMBETH, JUDGE PRESIDING

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

Appellant Tammie Cande Philips Filla ("Tammie") and appellee Chad Lee Filla ("Chad") were married in 2004 and divorced in 2007. They had one child, M.F., during their marriage. In the original custody arrangement at the time of the divorce, Tammie had the exclusive right to designate the primary residence of M.F. In April 2010, Tammie and Chad entered into a mediated settlement agreement in which they agreed to modify the terms of their divorce decree pertaining to conservatorship and possession of M.F., including, among other things, agreeing that Chad would have the exclusive right to designate M.F.'s primary residence.

On May 9, 2010, Tammie contacted Child Protective Services ("CPS") and made an allegation that Chad was abusing M.F. On May 11, 2010, while the CPS investigation was pending, the trial court rendered a modification order pursuant to the mediated settlement agreement that had been reached in April. CPS completed its investigation on July 9, 2010, and ultimately ruled out the

allegations of abuse against Chad. At the same time, CPS found a "reason to believe" that Tammie had been emotionally abusive to M.F. by potentially coaching M.F. to make allegations of abuse against Chad and putting M.F. through multiple intrusive medical examinations and interviews in relation to the allegations.

Based on CPS's finding regarding Tammie, Chad filed a petition to modify the previous custody order, requesting temporary and permanent orders that Tammie have only supervised visitation with M.F. The trial court conducted a hearing on Chad's temporary-orders request. Before the hearing was over, Tammie filed a counterpetition to modify the previous order, requesting that she be awarded the right to designate the primary residence of M.F. and alleging once again that Chad abused M.F. After the hearing, the trial court rendered temporary orders and ordered that Tammie's visitation with M.F. be supervised. As part of the temporary orders, the trial court also appointed a guardian ad litem to the case and ordered that Tammie undergo a psychological evaluation and begin intensive therapy with a psychologist.

In February 2014, the trial court held a jury trial on Tammie's counterpetition for modification. The jury denied Tammie's request to modify the custody order and found that Chad should retain the right to designate M.F.'s primary residence. The trial court then held a bench hearing on the issue of a possession schedule for M.F. At the close of the hearing, the trial court ordered that Tammie's possession of M.F. would be set as the one recommended by the guardian ad litem, which was eleven hours on Saturday and six hours on Sunday on the first, third, and fifth weekends of each month in addition to certain holiday possession times. Tammie appeals from the

trial court's order, challenging the jury's verdict and the trial court's ruling. We will affirm the trial court's order.

DISCUSSION

Tammie raises four issues on appeal, contending that: (1) the trial court erred in failing to issue findings of fact and conclusions of law, (2) the trial court erred in modifying the previous custody order, (3) the evidence is insufficient to support the jury's conclusion that Chad should retain the right to designate the primary residence of M.F., and (4) the trial court erred in deviating from a standard possession order. We will address each issue below.

Findings and Conclusions

In her first issue, Tammie asserts that the trial court erred in not issuing findings of fact and conclusions of law stating the specific reasons for the trial court's deviation from a standard possession order. Tammie filed a request for findings of fact and conclusions of law six days after the trial court made its ruling regarding the possession schedule. The request was filed pursuant to rule 296 of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 296 ("In any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law."). When the trial court did not file findings and conclusions within twenty days after the request was filed, Tammie filed a notice of past-due findings of fact and conclusions of law. *See id.* 297 (court shall file findings of fact and conclusions of law within twenty days after filing of timely request, and if court does not do so, party making request shall file past-due notice).

Chad contends that Tammie waived her right to receive findings of fact and conclusions of law because she made her request under rule 296 of the Texas Rules of Civil Procedure rather than section 153.258 of the Texas Family Code. *See* Tex. Fam. Code § 153.258. Section 153.258 states the following:

> Without regard to Rules 296 through 299, Texas Rules of Civil Procedure, in all cases in which possession of a child by a parent is contested and the possession of the child varies from the standard possession order, on written request made or filed with the court not later than 10 days after the date of the hearing or on oral request made in open court during the hearing, the court shall state in the order the specific reasons for the variance from the standard order.

Id. Tammie concedes that she cited only rule 296 in her request and that there are cases holding that a request under Rule 296 and not under section 153.258 waives the party's complaint under section 153.258. *See In re D.C.*, No. 05-12-01574-CV, 2014 WL 1887611, at *6 (Tex. App.—Dallas May 9, 2014, no pet.) (mem. op.); *Pickens v. Pickens*, No. 12-13-00235-CV, 2014 WL 806358, at *2 (Tex. App.—Tyler Feb. 28, 2014, no pet.) (mem. op.); *Beach v. Beach*, No. 05-05-01316-CV, 2007 WL 1765250, at *8 (Tex. App.—Dallas June 20, 2007, no pet.) (mem. op.), *disapproved on other grounds*, *Iliff v. Iliff*, 339 S.W.3d 74 (Tex. 2011). However, she contends that those cases are "wrongly decided and should not apply here."

We note at the outset that the cases cited by Tammie from the Dallas Court of Appeals, *In re D.C.* and *Beach*, do not hold that a party waives all complaints about a lack of findings of fact and conclusions of law by failing to cite to section 153.258 in her request. Rather, the cases hold that a request that cites rule 296 of the rules of civil procedure rather than section 153.258 of the family code waives a complaint *under section 153.258 of the family code*, not

necessarily that it waives a complaint under rule 296. *See In re D.C.*, 2014 WL 1887611, at *6. In *Beach*, the trial court filed findings and conclusions pursuant to a request under rule 296 but did so in an untimely manner. 2007 WL 1765250, at *8. The appeals court assessed whether the late-filed findings and conclusions caused the appellant injury and concluded that they did not. *Id*. In *In re D.C.*, the appeals court did not address whether the trial court should have filed findings and conclusions pursuant to rule 296 because the appellant had failed to preserve her complaint under rule 296 by failing to file a notice of past due findings and conclusions. 2014 WL 1887611, at *6.

Here, the trial court did not file findings and conclusions pursuant to rule 296, and Tammie timely filed a notice that the findings and conclusions were past due. Rule 296 applies only to issues decided by the trial court, not those decided by a jury. *See* Tex. R. Civ. P. 296 (referencing only cases tried "without a jury"); *In re H.L.*, No. 02-14-00388-CV, 2016 WL 354080, at *4 (Tex. App.—Fort Worth Jan. 28, 2016, pet. filed) (mem. op.) (noting that mother requested findings and conclusions under rule 296 and that trial court filed findings and conclusions regarding issues decided by trial court—possession, access, and child support—and not issues decided by jury). In suits affecting a parent-child relationship, parties are entitled to a jury verdict on the issue of which party has the exclusive right to designate the primary residence of the child but not on the issue of the terms or conditions of possession of or access to the child. *See* Tex. Fam. Code § 105.002(c)(1), (c)(2)(B). Consistent with those provisions of the family code, the jury in this case decided the former issue and the trial court decided the latter. Thus, under rule 296, the only findings and conclusions the trial court was required to make were those pertaining to the trial court's ruling on Tammie and Chad's possession of M.F.

We agree with our sister courts that Tammie was not entitled to findings and conclusions under section 153.258 of the family code when she did not cite section 153.258 or specifically request findings regarding the trial court's deviation from a standard possession schedule, but we disagree that a trial court is excused from filing findings and conclusions on non-jury issues when a party files a proper request under rule 296. *See Roberts v. Roberts*, 999 S.W.2d 424, 434 (Tex. App.—El Paso 1999, no pet.) (party entitled to findings and conclusions on jury findings that were merely advisory and not binding on trial court); *Heafner & Assoc. v. Koecher*, 851 S.W.2d 309, 312–13 (Tex. App.—Houston [1st Dist.] 1992, no writ) (party entitled to findings and conclusions on trial-court findings made independent of jury's verdict). Accordingly, we conclude that the trial court erred in failing to file findings and conclusions pursuant to rule 296 regarding its ruling on the parties' possession of and access to M.F. To the extent that *Pickens* or any other cases conclude that trial courts need not file findings and conclusions on non-jury questions after receiving a timely request under rule 296, we respectfully disagree.

Although we find error, the failure to file findings and conclusions does not require reversal if the record affirmatively demonstrates that the requesting party suffered no harm from their absence. *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996); *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989). The general rule is that an appellant has been harmed if, under the circumstances of the case, she is forced to guess the reasons why the trial court ruled against her and therefore is prevented from properly presenting a case to the appellate court. *Tenery*, 932 S.W.2d at 30; *Liberty Mut. Fire Ins. v. Laca*, 243 S.W.3d 791, 794 (Tex. App.—El Paso 2007, no pet.); *Gray v. Gray*, 971 S.W.2d 212, 217 (Tex. App.—Beaumont 1998, no pet.).

Here, Tammie did not have to guess the reasons why the trial court deviated from a standard possession schedule because the trial court's reasons are evident from the record. At the hearing on the possession schedule, Chad's attorney requested that the trial court follow the guardian ad litem's final recommendations regarding the possession schedule. The trial court asked for a copy of the guardian ad litem's final written recommendations. The trial judge had also presided over the jury trial, where the guardian ad litem's final recommendations were admitted into evidence and where the guardian ad litem testified about her recommendations. In the final written recommendations, which were in letters dated April 22, 2013, and July 29, 2013, the guardian ad litem listed five reasons for her recommendation that Tammie be awarded less than a standard possession schedule. At the end of the hearing, the trial judge stated, "I am going to follow the recommendations of [the guardian ad litem] regarding the final visitation." Further, in the final modification order, the trial court stated that "The Court finds that [the] final recommendations, as stated in the April 22, 2013 and July 29, 2013 letters of the Guardian Ad Litem . . . are in the best interest of [M.F.]."

In arguing on appeal that the trial court erred in deviating from a standard possession schedule, Tammie lists the reasons for the guardian ad litem's recommendations and argues that those reasons are insufficient to support the trial court's conclusion. The reasons listed by the guardian ad litem are also the same ones addressed in testimony and other evidence throughout the jury trial. Because the trial court stated that it was following the guardian ad litem's recommendations, because Tammie has fully briefed the issue of the trial court's deviation from a standard possession schedule based on the guardian ad litem's reasoning for her recommendations,

and because the reasons listed by the guardian ad litem are the same issues addressed during the trial and the subsequent hearing on the possession schedule, Tammie has not shown that she had to guess at the trial court's reasoning and that she was prevented from properly presenting her case to this Court. *See Cobb v. Cobb*, No. 03-14-00325-CV, 2016 WL 3136886, at *4 (Tex. App.—Austin June 3, 2016, no pet. h.) (mem. op.) (no injury from lack of findings and conclusions where appellant did not show that he was prevented from raising any issues on appeal or otherwise harmed); *Michelena v. Michelena*, No. 13-09-00588-CV, 2012 WL 3012642, at *20 n.26 (Tex. App.—Corpus Christi June 15, 2012, no pet.) (mem.op.) (no injury from lack of findings and conclusions where appellant showed by argument and analysis in her brief that she knew reasons for trial court's decision to deviate from standard possession order). Because we conclude that Tammie has not shown that she suffered any injury from the trial court's failure to file findings and conclusions, we overrule her first issue.

Modification of Previous Custody Order

In her second issue, Tammie contends that the trial court erred in modifying the previous custody order because there is no evidence that a material and substantial change in circumstances occurred after the previous order. The change-in-circumstances requirement is a threshold issue for the trial court and is based on a policy of preventing constant re-litigation with respect to children. *See Zeifman v. Michels*, 212 S.W.3d 582, 589, 595 (Tex. App.—Austin 2006, pet. denied). In deciding whether circumstances have materially and substantially changed, the trial court is not confined to rigid rules or definite guidelines. *See id.* at 589; *In re T.M.P.*, 417 S.W.3d 557, 564 (Tex. App.—El Paso 2013, no pet.). Instead, the court's determination

is fact-specific and must be made according to the circumstances of the case. *In re A.L.E.*, 279 S.W.3d 424, 428 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing *Zeifman*, 212 S.W.3d at 593). To prove that a material change in circumstances has occurred, the movant is required to show the conditions that existed at the time of the entry of the prior order. *Considine v. Considine*, 726 S.W.2d 253, 255 (Tex. App.—Austin 1987, no writ). Once the conditions have been established, the movant must show the material changes that have occurred in the intervening period. *Id.*

If an appellant filed her own petition to modify in the trial court and alleged a material and substantial change in circumstances, her allegation constitutes a judicial admission that a material and substantial change occurred. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001) (assertions of fact in live pleadings and not pleaded in the alternative constitute judicial admissions); *Coburn v. Moreland*, 433 S.W.3d 809, 829 (Tex. App.—Austin 2014, no pet.) (appellant's counterpetition alleging material and substantial change in circumstances constituted judicial admission); *In re A.E.A.*, 406 S.W.3d 404, 409–10 (Tex. App.—Fort Worth 2013, no pet.) ("One party's allegation of changed circumstances of the parties constitutes a judicial admission of the common element of changed circumstances of the parties in the other party's similar pleading."); *In re L.C.L.*, 396 S.W.3d 712, 718 (Tex. App.—Dallas 2013, no pet.) (same). Here, Tammie filed a counterpetition to modify the previous custody order and proceeded on that pleading at the jury trial. In the counterpetition, she alleged that "[t]he circumstances of the child, a conservator, or other party affected by the order to be modified have materially and substantially changed since the date of rendition of the order to be modified."

Tammie makes five arguments in her reply brief as to why we should not follow the well-established law that her allegation constitutes a judicial admission. In her first argument, she asserts that this Court should not follow precedent because the jury found that Tammie did not prove that a material and substantial change occurred. However, Tammie does not cite, and we have not found, any authority supporting her argument. In her second argument, she asserts that a statement that a material and substantial change occurred is a legal statement, not a factual statement, and that judicial admissions apply only to statements of fact. However, Tammie's position is incorrect; the issue of whether a material and substantial change occurred is a question of fact. *See Phillips v. Phillips*, 701 S.W.2d 651, 652 (Tex. 1985), *overruled on other grounds by Martin v. Martin*, 776 S.W.2d 572 (Tex. 1989) ("The existence of a material and substantial change in the circumstances of the child or person affected by the child support order or decree is a question of fact for the trier of fact."). Consistent with this principle, the issue of whether a material and substantial change occurred can properly be submitted to a jury as a fact issue, which occurred in this case. *See* Tex. Fam. Code §§ 105.002(c)(1) (party entitled to jury verdict on question of which conservator has exclusive right to designate primary residence of child), 156.101 (to modify terms and conditions of conservatorship, requesting party must prove material and substantial change in circumstance occurred after previous order).

In Tammie's third argument, she contends that she should not be held to the assertion she made in her pleading because she only made it because it was an essential element of the pleading in order to get the previous custody order modified. However, Tammie does not cite, nor have we found, any authority supporting this argument. Her argument is also unpersuasive because

she not only pleaded that a material and substantial change occurred, but she then sought and had a jury trial based on that pleading and presented evidence and argument at trial attempting to prove that a material and substantial change occurred. She also continues to assert in another issue on appeal that a material and substantial change occurred. In her fourth argument relating to the judicial admission, she contends that we should disregard established precedent because the cases do not provide sufficient analysis on the issue. We find this argument to be without merit, as the case law and rationale is well-established.

In her final argument, Tammie contends that her allegations of a material and substantial change differed from Chad's and should not be treated the same. In support of this argument, Tammie states that "[t]reating [the allegations] as the same subverts due process because an appellate court that applies this line of cases essentially decides a party's factual allegations for that party. In doing so, an appellant court also impermissibly usurps the jury's factfinding role." Tammie cites to only one supporting case, and she does so for the proposition that an appellate court should not usurp a trial court's fact-finding function. We conclude that the case she cites does not in any way override the well-established case law providing that an allegation in a pleading of a material and substantial change constitutes a judicial admission of the same element in the opposing party's claim for modification of the previous order. *See Holy Cross*, 44 S.W.3d at 568; *Coburn*, 433 S.W.3d at 829; *In re A.E.A.*, 406 S.W.3d at 409–10; *In re L.C.L.*, 396 S.W.3d at 718. Because Tammie judicially admitted this element, she is barred on appeal from challenging the sufficiency of the evidence to support it. *See In re A.E.A.*, 406 S.W.3d at 410; *Thornton v. Cash*, No. 14-11-01092-CV, 2013 WL 1683650, at *12 (Tex. App.—Houston [14th Dist.] Apr. 18, 2013,

no pet.) (mem. op.); *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 305 (Tex. App.—Houston [14th Dist.] 1995, no writ). Accordingly, we reject the arguments advanced by Tammie and overrule her second issue.[1]

Conservatorship and Possession

In her third and fourth issues, Tammie contends that the evidence is insufficient to support the jury's verdict and that the trial court erred in deviating from a standard possession schedule in its final order. A child's best interest is always the primary consideration of the court in determining issues of conservatorship and possession of and access to a child. Tex. Fam. Code § 153.002. Courts may use a nonexhaustive list of factors to determine the child's best interest. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *Miller v. Miller*, No. 03-14-00603-CV, 2015 WL 6830754, at *5 (Tex. App.—Austin Nov. 4, 2015, no pet.) (mem. op.). Those factors include (1) the desires of the child, (2) the emotional and physical needs of the child now and in the future, (3) the emotional and physical danger to the child now and in the future, (4) the parental abilities of the individuals seeking custody, (5) the programs available to assist these individuals to promote the best interest of the child, (6) the plans for the child by these individuals or by the agency seeking custody, (7) the stability of the home or proposed placement, (8) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one, and (9) any excuse for the acts or omissions of the parent. *Holley*, 544 S.W.2d at 371–72. Other factors to

[1] Tammie also argues that the evidence is insufficient to establish the circumstances that were present at the time of the previous custody order. Because we conclude that Tammie judicially admitted that a material and substantial change occurred after the previous custody order, we need not address this argument.

consider in modification suits include the child's stability and the need to prevent constant litigation in child-custody cases. *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000); *Miller*, 2015 WL 6830754, at *5. Taking the best-interest standard into consideration, we will address each issue in turn.

A. Exclusive Right to Designate Primary Residence

Tammie argues that the evidence is insufficient to support the jury's verdict that Chad should retain the exclusive right to designate the primary residence of M.F. Because Tammie was the party seeking a modification to the previous custody order, she bore the burden of proof at the jury trial. Specifically, she bore the burden of establishing that (1) modification was in M.F.'s best interest, and (2) the circumstances of M.F., a conservator, or another party affected by the previous custody order had materially and substantially changed since the date of the previous order. *See* Tex. Fam. Code § 156.101(a).

A party attacking the legal sufficiency of an adverse finding on an issue on which that party bears the burden of proof must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). The party may prevail on appeal only if no evidence, or merely a scintilla of evidence, supports the adverse finding, and if the position advanced by the party is conclusively established. *See PlainsCapital Bank v. Martin*, 459 S.W.3d 550, 557 (Tex. 2015); *Dow*, 46 S.W.3d at 241; *see also City of Keller v. Wilson*, 168 S.W.3d 802, 815–16 (Tex. 2005) (explaining nature of conclusive evidence). We consider all of the evidence in the light most favorable to the verdict and indulge every reasonable inference that would support it. *City of Keller*, 168 S.W.3d at 822.

When a party attacks the factual sufficiency of an adverse finding on an issue on which she has the burden of proof, she "must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence." *Dow*, 46 S.W.3d at 242; *City of Austin v. Chandler*, 428 S.W.3d 398, 407–08 (Tex. App.—Austin 2014, no pet.). In reviewing a factual sufficiency challenge, we consider all of the evidence and set aside a verdict only if the evidence is so weak that the finding is clearly wrong and unjust. *Dow*, 46 S.W.3d at 242.

In conducting our review of both the legal and factual sufficiency of the evidence, we are mindful that the jury, as the fact finder on this issue, was the sole judge of the credibility of the witnesses and the weight to be given their testimony. *City of Keller*, 168 S.W.3d at 819; *Hinkle v. Hinkle*, 223 S.W.3d 773, 782 (Tex. App.—Dallas 2007, no pet.). When there is conflicting evidence, the resolution of such conflicts is within the province of the jury. *City of Keller*, 168 S.W.3d at 820; *Hinkle*, 223 S.W.3d at 782. We may not substitute our judgment for that of the jury, even if we would reach a different conclusion based on the evidence. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998).

Here, we will first address the initial prong Tammie was required to prove: that modification of the previous custody order was in the best interest of M.F. A review of the record shows considerable evidence supporting a finding that the best interest of M.F. was served by Chad retaining the exclusive right to designate her primary residence. To begin with, the evidence shows that M.F. was primarily in Chad's care for more than three years before the jury trial, that M.F. was doing well, and that Chad and his current wife were very involved in addressing M.F.'s educational, medical, and emotional needs. M.F.'s current teacher testified that M.F. was "a very sweet, little,

sensitive girl." She testified that "[M.F.] most of the time always has a smile on her face and is friendly with everybody, and I enjoy her being in my class very much." She further testified that Chad and his wife were "very diligent" about communicating with her about M.F.'s academic progress and ensuring that all homework assignments were completed. She testified that M.F. and Chad interacted well and that M.F. respected Chad and enjoyed spending time with him. She testified that Chad's wife also had "very positive" interactions with M.F.

M.F.'s teacher from the previous year testified that M.F. was "a great second-grader," and was "very sweet" and "well-behaved." She testified that M.F. listened well, participated in class, and made friends with her classmates. She further testified that M.F. had some academic difficulties when she started the school year and that Chad and his wife were "very supportive" to the teacher and M.F. In addition, she testified that Chad and his wife stayed in daily communication with her and that they wanted to do everything they could to help M.F. at home and obtain appropriate tutoring for her if necessary. She also testified that Chad and M.F. were "very close" and that Chad walked M.F. into the school every morning and had pleasant exchanges with her before leaving. She testified that M.F. made "really good improvements" in academic achievement by the end of the school year.

M.F.'s therapist also testified that Chad stayed in regular contact with her about M.F. She testified that M.F. was a "nice child" and a "happy child" and that she showed a "gentleness" in her actions. She testified that M.F. also enjoyed singing, dancing, and cooking and was "excited about life" most of the time. The therapist further testified that the interactions she had observed

among M.F., Chad, and Chad's wife were "nice interaction[s] around working puzzles, reading a book, talking."

Chad testified that he and his wife worked with M.F.'s teachers and with M.F. at home to ensure that she was continuing to improve in school. He testified that he also enrolled M.F. in tutoring programs to provide her with additional help. He further testified that M.F. had speech delays and that he consequently enrolled her in speech therapy, took her to her appointments, and helped her with speech-therapy homework. He testified that M.F. made great improvements and eventually no longer needed speech therapy. Consistent with Chad's testimony, M.F.'s speech therapist also testified that M.F. progressed significantly with her speech delays and was eventually discharged.

Chad also testified about M.F.'s extensive dental issues. He testified that M.F. had four root canals before she was five years old. He further testified that the root canals "didn't take" and that some of M.F.'s teeth became abscessed and had to be extracted. He testified that she had two more oral surgeries and then had to get braces and have an appliance put on her lower teeth. He further testified that it was very important to follow the instructions of the dentist and oral surgeon regarding the care of M.F.'s teeth. He testified that the only time he let M.F. stray from the dietary restrictions was for special occasions.

Chad's wife testified that she was a preschool teacher and had worked with children for several years. She testified that she and Chad had been married for almost four years and that she was fully committed to caring for M.F. and supporting Chad in his care of M.F. She testified that she loved M.F. and had "a really good bond with her." She further testified that she helped M.F.

with her homework, made her lunches, helped get her to appointments and activities, and did all sorts of activities with her, including going for walks and bike rides and playing games with her. She also testified that she was "absolutely" supportive of M.F.'s relationship with Tammie, as she felt it was important for a child to have a close relationship and bond with both of her parents.

In contrast to Chad and his wife's involvement, the evidence shows that Tammie did not stay in contact with M.F.'s teachers, therapist, or the guardian ad litem. M.F.'s second-grade teacher testified that Tammie never contacted her during the school year. M.F.'s third-grade teacher testified that Tammie had not communicated with her in any way during the school year and that she would have communicated with Tammie if she had made contact. M.F.'s therapist also testified that Tammie was permitted to be in contact with her but had not made contact. The guardian ad litem similarly testified that Tammie could have communicated with her about any concerns she was having but did not do so. In addition, the guardian ad litem testified that she advised Tammie to call or visit with M.F.'s dentist in order to become fully informed about the dentist's instructions for M.F.'s care, but Tammie did not do so. Tammie testified that she did not communicate with M.F.'s therapist or the guardian ad litem because she believed they had already formed their opinions about her and that her input would not have made any difference.

Further testimony from M.F.'s therapist and the guardian ad litem also supported a finding that M.F.'s best interest was served by Chad retaining the exclusive right to designate her primary residence. M.F.'s therapist testified that she had been working with M.F. since 2008 and that after M.F.'s primary custodian changed from Tammie to Chad in 2010, M.F. did not experience anxiety or stress about no longer living primarily with her mother. The therapist further testified that

over time, she talked to M.F. about M.F.'s feelings regarding the possibility of overnight visits with Tammie, and M.F. initially stated that she did not want to have overnight visits. The therapist testified that M.F. later stated that she would be willing to have one overnight visit but was not comfortable having more than one. The therapist further testified that M.F. was well-cared for at Chad's home and that immediately changing her primary home from Chad's to Tammie's would be "clinically not wise."

The guardian ad litem testified that she was originally appointed to the case in 2008 and then dismissed in 2010 when the case was closed. She testified that she was then reappointed to the case later in 2010 when the case reopened and that she had stayed on the case ever since. She testified that Tammie made improvements in her behavior over the years but still had some issues that needed addressing. She testified that her final recommendation was that Chad retain the exclusive right to designate M.F.'s primary residence and that Tammie be awarded eleven hours of unsupervised visitation with M.F. on Saturday and six hours on Sunday on the first, third, and fifth weekends of each month. She testified that M.F. was thriving in the current custody arrangement and that it would be detrimental to her well-being if primary custody were switched from Chad to Tammie. In her report on the subject, which was admitted into evidence at trial, she listed the reasons for her final recommendation:

> After numerous requests by the Ad Litem as well as [Tammie's] individual therapist, [Tammie] consistently disregards the dental guidelines required by [M.F.'s] dentist. She feeds her sodas and candy while knowing that her child has had thousands of dollars of dental expenses over the last three years.
>
> [M.F.] is still showing severe anxiety by having wetting and bowel accidents when she is with her mother.

> [M.F.] describes her mother's behavior at times as distracted and unengaged (texting on the phone and not following through with promises).
>
> [Tammie] has not taken all of the time she has been given so far.
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> [Tammie] has outstanding balances owed to [Chad] for medical expenses, [the guardian ad litem] for Guardian Ad Litem services, [the therapist] for the child's counseling and [Tammie's therapist] for individual therapy. All of the services have been in her child's best interest.

Some of the stated reasons were addressed in more detail during the trial. For example, the guardian ad litem testified that over time, she recommended the suspension of supervised visitation and an increase in the number of Tammie's unsupervised weekend hours, but Tammie consistently did not exercise all of the unsupervised time allowed. She testified that Tammie failed to exercise more than one-hundred hours of unsupervised weekend visitation time in the previous two years. In addition, the testimony of one of the people who supervised visits between Tammie and M.F. and the related records between 2010 and 2012 indicate that Tammie sometimes gave M.F. candy and soda during visits despite being informed by Chad that M.F.'s dentist advised against her consuming carbonated drinks and hard candy. Records from supervised visits between 2010 through 2013 also indicate that M.F. sometimes wet or soiled her pants while she was with her mother. Regarding money Tammie owed to the professionals assigned to the case, M.F.'s therapist testified that Tammie still owed her approximately $2,450. The guardian ad litem testified that she had been paid in full the week of the trial but had to hire legal representation in order to get paid.

Further, the record shows that the reason Tammie was originally ordered to have only supervised visitation with M.F. was because CPS found that there was a reason to believe Tammie

had been emotionally abusive to M.F. The CPS investigator who was assigned to the case testified, consistent with the CPS records admitted into evidence at trial, that the determination was made because the investigation indicated a possibility that Tammie coached M.F. to make an outcry of sexual abuse against Chad. The investigator testified that, among other indications of possible coaching, there was an instance in which the investigator asked M.F. if anyone had told her what to say, and M.F. responded by looking directly at Tammie. The investigator further testified that Tammie had subjected M.F. to physical exams, including an exam with a sexual assault nurse examiner, as a result of the allegations. Ultimately, CPS ruled out the allegations against Chad. The investigator testified that the standard for finding a "reason to believe" emotional abuse occurred is "extremely high," that "it's rare that it's actually found," and that CPS determined that the severity of the emotional abuse finding in this case was "serious."

The evidence also shows that even after CPS ruled out the allegations against Chad and even after the trial court ordered that Tammie have supervised visitation and undergo a psychological evaluation, Tammie continued for more than a year to examine M.F. and question her about bruises and scratches during supervised visits. Further, the guardian ad litem and M.F.'s therapist testified that Tammie did not begin therapy until two years after the trial court ordered her to begin.

On the other hand, records from the supervised visits and the guardian ad litem indicate that Tammie had stopped bringing candy, soda, and gum to visits by January 2013, that she eventually stopped asking about M.F.'s bruises and scratches, and that she had "great success" with improving M.F.'s wetting and soiling accidents by implementing a system of regular bathroom

breaks during their time together. In addition, two people who provided supervision for Tammie's weekly supervised visits in 2012 and 2013 testified that the visits went well and that there was no need for further supervision.[2] Further, the psychologist who conducted the examination of Tammie in 2010 pursuant to the court's 2010 order testified that he saw no evidence that Tammie had a major mental illness. He testified that she had difficulty with seeing ambiguity and would see issues from the viewpoint of either one extreme or the other. Consistent with that assessment, he testified that Tammie may have coached M.F. to make the allegations of sexual abuse, but she would have done so believing the allegations to be true based on her extreme feelings about Chad.

Tammie's psychologist testified that he had been seeing her for approximately two years. He testified that he worked with her to address the anxiety she felt related to her belief that Chad was abusing M.F. Specifically, he testified that he focused on helping her move on from the allegations and stop examining M.F., taking photographs, and questioning her about alleged injuries during visits. He testified that Tammie made progress on the issues he addressed with her and that he would not have stayed on the case if she had not.

Although the evidence shows that Tammie made progress in several areas of concern to the guardian ad litem and therapists, considerable evidence shows that M.F. was a happy and well-adjusted child after living primarily with Chad for more than three years; that Chad and his wife were very involved in supporting her educational, medical, and emotional needs; that Tammie had not

[2] We note that the guardian ad litem recommended a suspension of supervised visits nearly a year before trial, but Tammie testified that she continued going to her Tuesday evening supervised visits because she wanted to see M.F. during the week, and the guardian ad litem's updated recommendations provided for visitation time only on the weekends. The guardian ad litem testified that Tammie never communicated to her that she wanted unsupervised time during the week.

made efforts to communicate with M.F.'s teachers, therapist, or the guardian ad litem about M.F.'s well-being; that M.F.'s therapist and the guardian ad litem recommended against changing M.F.'s primary residence; and that Tammie did not use all of the unsupervised visitation time allotted to her. Considering all of the evidence in the light most favorable to the verdict, as we must, we conclude that considerable evidence supports the jury's verdict and that Tammie did not conclusively establish that changing M.F.'s primary custodian was in M.F.'s best interest. *See PlainsCapital*, 459 S.W.3d at 557; *City of Keller*, 168 S.W.3d at 815–16; *Dow*, 46 S.W.3d at 241. Considering all the evidence in a neutral light, we conclude that Tammie has not demonstrated that the jury's verdict was against the great weight and preponderance of the evidence.[3] *See Dow*, 46 S.W.3d at 242. Having concluded that the evidence is legally and factually sufficient to support the jury's verdict, we overrule this issue.

B. Possession and Access

Tammie contends that the trial court erred in deviating from a standard possession schedule in its modification order. A trial court may modify conservatorship and possession if the petitioning parent shows that the circumstances of the child, a conservator, or some other affected party have materially and substantially changed and that modification would be in the child's best interest. Tex. Fam. Code § 156.101. We review a trial court's modification of conservatorship or possession for an abuse of discretion. *See Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982);

[3] Because Tammie bore the burden of proving both that a modification was in M.F.'s best interest and that a material and substantial change had occurred, and because we conclude that Tammie did not meet her burden with respect to M.F.'s best interest, we need not address the issue of whether she proved that a material and substantial change occurred.

Zeifman, 212 S.W.3d at 587. The abuse of discretion standard overlaps with traditional sufficiency standards of review in family law cases, creating a hybrid analysis. *Zeifman*, 212 S.W.3d at 587–88. In determining whether an abuse of discretion occurred, the reviewing court therefore engages in a two-pronged inquiry: (1) whether the trial court had sufficient information upon which to exercise its discretion; and (2) whether the trial court erred in the application of its discretion. *Echols v. Olivarez*, 85 S.W.3d 475, 477–78 (Tex. App.—Austin 2002, no pet.). The focus of the first inquiry is the sufficiency of the evidence. *Zeifman*, 212 S.W.3d at 588. The reviewing court must then decide whether, based on the evidence before it, the trial court made a reasonable decision. *Id.* As a result, legal and factual sufficiency are not independent grounds of error in modification cases; rather, they are relevant factors in deciding whether the trial court abused its discretion. *In re T.M.P.*, 417 S.W.3d at 562.

To determine whether there is legally sufficient evidence, we consider the evidence in the light most favorable to the trial court's findings, crediting favorable evidence if a reasonable factfinder could and disregarding contrary evidence unless reasonable jurors could not. *City of Keller*, 168 S.W.3d at 807. When reviewing the evidence for factual sufficiency, we consider and weigh all the evidence presented and will set aside the trial court's findings only if they are so contrary to the overwhelming weight of the evidence such that they are clearly wrong and unjust. *Id.* at 822. When the evidence conflicts, we must presume that the factfinder resolved any inconsistencies in favor of the order if a reasonable person could do so. *Id.* at 821. The trial court does not abuse its discretion if evidence of a substantive and probative character exists in support of its decision. *Zeifman*, 212 S.W.3d at 587. The trial court is in the best position to observe and

assess the witnesses and their demeanor, and an appellate court must give "great latitude" to the trial court in determining the best interest of a child. *In re A.L.E.*, 279 S.W.3d at 427. As a result, the mere fact that an appellate court might decide the issue differently than the trial court does not establish an abuse of discretion. *Zeifman*, 212 S.W.3d at 587.

There is a rebuttable presumption that the family code's standard possession order is in a child's best interest. Tex. Fam. Code § 153.252. However, if the standard order would be unworkable or inappropriate, the trial court may exercise its discretion in deviating from the standard order. *See id.* §§ 153.253 ("The court shall render an order that grants periods of possession of the child as similar as possible to those provided by the standard possession order if the work schedule or other special circumstances of the managing conservator, the possessory conservator, or the child, or the year-round school schedule of the child, make the standard order unworkable or inappropriate."), .256 (in deviating from standard order, trial court may consider child's age, developmental status, circumstances, needs, and best interest; parents' circumstances; and other relevant factors).

Here, as discussed above, the trial court stated that it was ordering a deviation from a standard possession schedule because it was following the guardian ad litem's recommendations. The guardian ad litem recommended that Tammie be awarded unsupervised possession of M.F. on the first, third, and fifth weekend of every month from 9:00 a.m. to 8:00 p.m on Saturdays and from noon to 6:00 p.m. on Sundays. The reasons listed for her recommendations were Tammie's disregard of the dental guidelines for the care of M.F.'s teeth, M.F.'s "severe anxiety" as evidenced by wetting and bowel accidents during visits with Tammie, Tammie's distracted and disengaged

behavior during visits, Tammie's failure to exercise all of her visitation time, and Tammie's failure to pay balances owed to Chad, the guardian ad litem, M.F.'s therapist, and Tammie's therapist.

As set forth in detail above, the evidence shows that Tammie made improvements on several of these concerns by the time of trial. However, the evidence also shows that she continued failing to exercise all of the visitation time allotted to her in the years leading up to trial and even after trial in the month between the trial and the hearing on the possession schedule. The recommendations from the guardian ad litem in the months leading up to trial and admitted into evidence at trial noted that Tammie was not exercising all of her unsupervised visitation time and warned her that continuing not to exercise all of the time could affect further recommendations. Specifically, a report from the guardian ad litem on January 15, 2013, approximately one year before trial, stated the following:

> [Tammie] has not accessed her unsupervised time in Georgetown, on the first, third, and fifth Saturdays of each month. [Tammie] usually states that her reason for not doing something is financially related. These unsupervised visits would have not cost her anything and it would have been one on one time for her and her daughter.
>
> . . . .
>
> If [Tammie] does not access her time as allotted in these recommendations, it will be assumed that she is not comfortable spending that amount of time alone with [M.F.] and adjustments will be made accordingly at the next review meeting.

Two weeks later, on January 30, 2013, the guardian ad litem provided another report again stating that "[Tammie] ha[d] not accessed her unsupervised time in Georgetown on the first, third, and fifth Saturdays of each month" and reiterating the same warning from the previous report. Two months later, on April 22, 2013, the guardian ad litem prepared her "final recommendations,"

which included the statement that "[Tammie] has not taken all of the time she has been given so far" as one of the reasons for recommending against a standard possession schedule. At trial, the guardian ad litem was questioned about her concerns about Tammie not exercising all of her visitation time, and she responded as follows:

> [M]y assumption, whenever we're going through a process of increasing time, is that a parent is so excited to get extra time, every minute that they can, that they are going to use every minute they get. So as soon as an increase of time happens, they are using it, and they are using it consistently, unless there is some sort of major emergency. So my concern was that it wasn't just a one-time thing. It was a consistent thing on her weekends, that she would have a certain number of hours, and she would only use a portion of them . . . [a]nd so the concern for me is just maybe—maybe what you have right now is—is your limit. Is that what you're telling me you know, with not accessing all your time.

The guardian ad litem further testified that Tammie had failed to exercise more than one-hundred hours of unsupervised weekend visitation time from May 2012 to the date of trial. In her brief, Tammie contends that the record shows that she exercised all of her visitation time, but she points only to evidence that she exercised her *supervised* visitation time, not her *unsupervised* time, which is the time addressed by the guardian ad litem.

Then, at the hearing on the possession schedule that occurred a month after the jury trial, Chad's attorney stated that Tammie was still not exercising all of the unsupervised visitation time allotted to her in the guardian ad litem's recommendations. Later in the hearing, the trial judge stated to Chad's attorney, "[Y]ou said that [Tammie] has not exercised all of her time since the trial. Let me hear more about that." Chad's attorney explained that Tammie "did start exercising more of that weekend time, but she's still ending the visit at, I believe, 5:00 or 6:00 on Saturday and a little

bit short on Sunday. In other words, she's still not up to [the] schedule." Tammie's attorney argued that Tammie was unsure of what her visitation schedule was because there was no order in place yet. In response, Chad's attorney stated that she had repeatedly told Tammie's attorney that Tammie should follow the guardian ad litem's recommendations. Further, there is no dispute that Tammie, like Chad, received all of the guardian ad litem's recommendations as they were made and that the same recommendations were discussed at trial.

Given the evidence that Tammie received multiple warnings that her visitation time would be in jeopardy if she did not exercise all of it, that she continued failing to exercise all of the time, and that she did so even after a jury trial in which her failure to exercise time was highlighted, we conclude that the trial court did not abuse its discretion in deviating from a standard possession schedule and not awarding Tammie additional visitation time.[4] *See Jhaveri v. McBeth*, No. 03-14-00261-CV, 2015 WL 8591659, at *2 (Tex. App.—Austin Dec. 10, 2015, pet. filed) (mem. op.) (mere fact that appellate court might decide issue differently than trial court does not establish

[4] Tammie also contends that a failure to exercise all her visitation time is "not a legitimate reason for restricting possession and access" and cites to *In re M.M.S.*, 256 S.W.3d 470, 475–77 (Tex. App.—Dallas 2008, no pet.) in support of her contention. In *In re M.M.S.*, evidence showed that the father's weekend periods of possession were sometimes exercised by or with his parents rather than solely by him and that he had failed to make the children available for the mother's summer possession during one summer. *Id.* at 475. The appeals court held that the trial court abused its discretion in modifying the possession schedule to limit the father's visitation. *Id.* at 476–477. We find *In re M.M.S.* distinguishable from this case because in this case, the evidence showed that the guardian ad litem had several concerns about Tammie's behavior over the years, and that although Tammie eventually corrected some of the behaviors before trial, she continued failing to exercise all of her visitation time despite several warnings from the guardian ad litem before trial and then further continued failing to exercise all her time after trial despite the issue being thoroughly addressed as a problem at trial. Given the particular circumstances of this case, we cannot conclude that the trial court abused its discretion in deviating from a standard possession order.

abuse of discretion); *Conn v. Rhodes*, No. 02-08-420-CV, 2009 WL 2579577, at *4 (Tex. App.—Fort Worth Aug. 20, 2009, no pet.) (mem. op.) (considering father's failure to exercise visitation as factor supporting trial court's deviation from standard possession order); *Zeifman*, 212 S.W.3d at 587 (no abuse of discretion as long as some substantive and probative evidence supports trial court's decision); *Echols*, 85 S.W.3d at 477 (trial court is in best position to observe witnesses and feel forces, powers, and influences that cannot be discerned from merely reading record). The trial court could have reasonably concluded based on the evidence that awarding Tammie additional visitation time was not in M.F.'s best interest when Tammie had not been exercising all of the time she already had. *See Zeifman*, 212 S.W.3d at 588. Accordingly, we overrule this issue.

CONCLUSION

Having overruled all of Tammie's issues, we affirm the trial court's modification order.

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Cindy Olson Bourland, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

Filed: August 5, 2016