TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00720-CV

Timothy Young, Appellant

v.

Stephanie Marie Young, Appellee

FROM THE COUNTY COURT AT LAW OF BASTROP COUNTY
NO. 10-13911, HONORABLE BENTON ESKEW, JUDGE PRESIDING

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

This case examines the propriety of discovery sanctions in a child-custody case. Appellant, Timothy Young, appeals from a judgment appointing appellee, Stephanie Marie Young, sole managing conservator of their child. He challenges the trial court's orders prohibiting him from calling witnesses or introducing documents at trial and striking his pleadings and jury demand as sanctions for his failure to comply with discovery requests and orders. For the reasons that follow, we will reverse and remand.

BACKGROUND

I. The parties filed cross-suits affecting the parent-child relationship

Timothy and Stephanie had one child, A.N.Y.[1] In May 2010, Timothy filed an original suit affecting the parent-child relationship seeking to be appointed joint managing

[1] For clarity, we refer to the parties by their first names, and we refer to the child by initials to protect the child's privacy. *See* Tex. Fam. Code § 109.002(d).

conservator and child support. Stephanie filed a counterpetition seeking to be appointed sole managing conservator and child support.[2] The trial court issued temporary orders appointing the parties joint managing conservators and ordered Timothy to pay child support.

II. The trial court entered an agreed order for a child-custody evaluation

A final hearing was set for March 18, 2013. A week before the hearing date, Timothy moved for a child-custody evaluation and sought another continuance on that basis. On March 18, the parties signed a Rule 11 agreement in which the parties agreed, in relevant part, to (1) participate in a custody evaluation conducted by psychologist Dr. Stephen Thorne, the costs of which Timothy would bear and pay by April 2013, and (2) postpone the final hearing until the evaluation was complete. The agreement required psychological evaluation of several individuals, including Timothy, Stephanie, and A.N.Y.

On June 10, 2013, the trial court entered an agreed order memorializing the Rule 11 agreement and ordering the parties to contact Dr. Thorne by June 11, 2013, to schedule their evaluation appointments. The order also required that Dr. Thorne submit to the court a written evaluation report detailing his "findings, including results of all tests made, diagnoses, and conclusions recommending terms for conservatorship and possession and access to" A.N.Y.

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[2] The parties' petitions indicated that they were or would be separated, and the record does not reveal any prior orders regarding custody or possession of A.N.Y.

III. The trial court ordered that Timothy was prohibited from introducing evidence at trial for his deficient discovery responses and his failure to comply with the evaluation order

On June 25, 2013, Stephanie served Timothy with discovery requests. His responses provided minimal information and were comprised mostly of objections. He also failed to pay for or schedule appointments with Dr. Thorne. In response, Stephanie filed a motion to compel discovery and a motion to compel Timothy's compliance with the evaluation order and sought sanctions in both.

On August 5, 2013, the trial court held a hearing on those motions. The court ordered that Timothy serve Stephanie with adequate discovery responses and comply with the evaluation order. The court also sanctioned Timothy by (1) prohibiting him from calling witnesses or introducing documents at trial and (2) ordering that he pay attorney's fees. However, the court stated that if Timothy filed a motion for reconsideration and demonstrated compliance with the discovery and evaluation requirements, the court would consider lifting the evidence-exclusion sanction.

On November 13, 2013, the trial court held a brief hearing, at which Stephanie sought entry of written orders memorializing the sanctions the court had orally issued at the August 5 hearing. Counsel for Stephanie informed the court that Timothy still had made no efforts to complete the evaluation. Counsel for Timothy stated that Timothy had arranged a payment plan with Dr. Thorne and would pay him in full by February 2014. The court orally ordered that final payment be made by March 1, 2014. The court entered written orders prohibiting Timothy from calling witnesses or introducing documents at trial and ordering him to schedule his appointments with Dr. Thorne by November 14, 2013, and to complete the appointments by January 15, 2014.

IV. The trial court struck Timothy's pleadings and jury demand for his continued refusal to comply with the custody-evaluation order

On May 28, 2014, Stephanie filed another motion to compel compliance with the evaluation order and for sanctions, which the trial court heard on June 25, 2014. At the hearing, the trial court ordered that Timothy fully comply with the evaluation within 45 days. The court repeatedly warned him that if he failed to comply, the court would strike his pleadings and jury demand and proceed to a bench trial on Stephanie's pleadings and evidence only. Counsel for Timothy again stated that Timothy could not afford the evaluation but offered no supporting evidence.

On August 4, 2014, days before the latest evaluation-completion deadline, Timothy filed a combined motion requesting that the trial court reconsider the evidence-exclusion sanction, change the evaluator, and permit Timothy to make a partial evaluation payment into the court registry. It was apparent from the motion that Timothy had again failed to comply with the evaluation order. Therefore, on August 14, 2014, the court entered a written order striking Timothy's pleadings and jury demand and restating the court's prior order prohibiting him from calling witnesses and introducing documents at trial,[3] citing Timothy's failure to comply with the evaluation order within 45 days.

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[3] The trial court had previously ordered the exclusion of Timothy's evidence both orally at the August 5, 2013 hearing and in writing on November 13, 2013. At the June 25, 2014 hearing, the trial judge stated that he "had already said [Timothy] couldn't call witnesses or introduce evidence." The court warned Timothy that if he did not demonstrate compliance with the evaluation order, his pleadings and jury demand would be struck; the court did not indicate that it would consider lifting the evidence-exclusion sanction.

On September 3, 2014, the court held a final hearing in the case. At the opening of the hearing, the court informed Timothy that he would not hear Timothy's August 4 combined motion for reconsideration and entered a written order denying that motion. The court also denied Timothy's objection to the court's denial of a jury trial that Timothy had filed that day. After a full hearing on the merits, the court named Stephanie sole managing conservator of A.N.Y. with the right to designate A.N.Y.'s primary domicile. The court named Timothy possessory conservator, granted him a standard possession schedule, and ordered payment of future child support, child-support arrearages, and attorney's fees. Timothy appealed.

DISCUSSION

I. Propriety of the discovery sanctions

In his sole issue, Timothy argues that the trial court abused its discretion in sanctioning him for his discovery abuse by prohibiting him from calling witnesses or introducing documents at trial and by striking his pleadings and jury demand.

A. Standard of review

We review a trial court's imposition of sanctions for an abuse of discretion. *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004). A trial court abuses its discretion when it acts without reference to guiding rules and principles. *Id.* at 838-39. The trial court's ruling should be reversed only if it was arbitrary or unreasonable. *Id*. at 839. We make that determination based on our review of the entire record. *American Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006).

B. Standards for imposing discovery sanctions

1. Two-part test for evaluating the propriety of sanctions issued under Rule 215.2

Texas Rule of Civil Procedure 215.2 authorizes a trial court to sanction a party for failure to comply with a discovery order or request. Any sanction imposed must be "just," Tex. R. Civ. P. 215.2(b), which is measured by two standards: (1) the existence of a direct relationship between the misconduct and sanction imposed, and (2) that the sanction imposed not be excessive. *TransAmerican Nat. Gas Corp. v. Powell,* 811 S.W.2d 913, 917 (Tex. 1991). Under first standard, the record must establish a nexus between the misconduct, the offender, and the sanction. *Id.* It must demonstrate that the sanction was directed against the abuse, imposed on the offender, and aimed at remedying the harm caused the innocent party. *Id*. The trial court must therefore attempt to determine whether the offensive conduct is attributable to counsel only, to the party only, or to both. *Id.*

Under the second standard, a sanction may be no more severe than necessary to satisfy legitimate purposes, which include securing compliance with discovery rules, deterring other litigants from similar misconduct, and punishing violators. *Id.*; *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003) (per curiam). Accordingly, a trial court must consider the availability of lesser sanctions and whether lesser sanctions would secure compliance. *TransAmerican*, 811 S.W.2d at 917.

2. Additional standards applicable to imposition of "death penalty" sanctions

Additional standards apply to certain sanctions imposed under Rule 215.2. Those sanctions include two of the sanctions imposed in this case: prohibiting a party from introducing evidence to support certain claims or defenses and striking a party's pleadings in whole or in part. Tex. R. Civ. P. 215.2(b)(4)-(5). Courts have described those sanctions as "death penalty" or "case determinative" sanctions because they have the effect of adjudicating claims, not on their merits, but for the failure of a party or his attorney to comply with discovery requirements or court orders. *See Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991) (citing Tex. R. Civ. P. 215.2(b)(3)-(5)); *TransAmerican,* 811 S.W.2d at 917-18. Such severe sanctions may be necessary to prevent an abusive party from thwarting the administration of justice by concealing the merits of a case. *Braden*, 811 S.W.2d at 929. But because they inhibit or terminate the presentation of the merits of a party's claim, they are further limited by constitutional due process. *TransAmerican,* 811 S.W.2d at 918. Thus, such sanctions should be reserved to address a party's flagrant bad faith or counsel's callous disregard for court orders or discovery rules. *Spohn*, 104 S.W.3d at 883.

To uphold the imposition of a death-penalty sanction on appeal, therefore, a reviewing court must find (1) that a party's misconduct justifies a presumption that his claims or defenses lack merit and, in most cases, (2) that the trial court actually tested lesser sanctions before imposing a death-penalty sanction. *TransAmerican,* 811 S.W.2d at 918; *Cire*, 134 S.W.3d at 841. As to the former, if a party refuses to produce material evidence despite incurring lesser sanctions, the trial court may presume that its claim or defense lacks merit and dispose of it. *TransAmerican,* 811 S.W.2d at 918. As to the latter, the record must show that the court analyzed available sanctions

and offered a reasoned explanation as to appropriateness of the sanction imposed. *Cire*, 134 S.W.3d at 841. A court may impose a death-penalty sanction "in the first instance only in exceptional cases when they are clearly justified and it is fully apparent that no lesser sanctions would promote compliance with the rules." *GTE Communications Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993).

3. Consideration of the child's best interest

Finally, courts have observed that discovery sanctions in cases involving determination of parental rights may be "difficult to reconcile with the legislative mandate that 'the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.'" *Taylor v. Taylor*, 254 S.W.3d 527, 534-35 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (quoting Tex. Fam. Code § 153.002); *Van Heerden v. Van Heerden,* 321 S.W.3d 869, 878 (Tex. App.—Houston [14th Dist.] 2010, no pet.). In such cases, therefore, the trial court must also consider the child's best interest when ruling on death-penalty sanctions. *See Taylor*, 254 S.W.3d at 534; *Van Heerden,* 321 S.W.3d at 878.

With respect to sanctions excluding evidence, one court explained that

> [a] decision on custody, possession, or access can rarely be well-informed without consideration of the evidence and perspectives of both parents. Because the exclusion of any important evidence as a discovery sanction can only produce a less-informed decision, contrary to the best interest of the child, we believe that it should be resorted to only where lesser sanctions are either impracticable or have been attempted and proven unsuccessful.

In re P.M.B., 2 S.W.3d 618, 624 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (superseded on other grounds). This Court has similarly recognized that, with regard to the best interest of the child, "'[i]t is in the court's primary interest to have as much evidence before it as possible.'" *Spurck v. Texas Dep't of Family & Protective Servs.*, 396 S.W.3d 205, 215 (Tex. App.—Austin 2013, no pet.) (quoting *R.H. v. Texas Dep't of Protective and Regulatory Servs.*, No. 03-00-00018-CV, 2001 WL 491119, at *8 (Tex. App.—Austin May 10, 2001, pet. denied) (not designated for publication)); *cf. Hartbrich v. Vance*, No. 03-01-00635-CV, 2002 WL 31476889, at *4 (Tex. App.—Austin Nov. 7, 2002, no pet.) (not designated for publication) (order striking pleadings in custody case may be in child's best interest).

C. Application of discovery-sanction standards to the sanctions imposed in this case

1. The trial court's order prohibiting Timothy from calling witnesses or introducing documents at trial was an abuse of discretion

Timothy argues that the trial court's order prohibiting him from calling witnesses or introducing documents at trial—a death-penalty sanction—was an abuse of discretion. *See* Tex. R. Civ. P. 215.2(b)(4). Although the record reveals offensive behavior by Timothy, Texas law generally requires a trial court to first test lesser sanctions before imposing a death-penalty sanction. *See Cire*, 134 S.W.3d at 841; *GTE Communications*, 856 S.W.2d at 729. Consequently, we agree that the sanction was improper.

At the August 5 hearing, the court first heard Stephanie's motion to compel discovery. The judge observed that Timothy's discovery responses were "clearly offensive." He described them as the "the kind of thing that people did during the Rambo days that we have clearly gotten rid of."

He explained that they prevented the court from determining A.N.Y.'s best interest by limiting the evidence available to the court. He then orally ruled that Timothy could not call witnesses or introduce documents at trial and limited him to cross-examining Stephanie's witnesses. He added, however, that if Timothy produced valid responses and filed a motion for reconsideration, he would consider lifting the sanction, "[b]ut, as they stand . . . he will be sanctioned by not allowing him to produce witnesses or documents."

The court then heard arguments on Stephanie's motion to enforce the evaluation order. Counsel for Stephanie explained that Stephanie had missed several days' work to meet with Dr. Thorne in order to comply with the evaluation order and that Timothy had made no appointments and made no payments to Dr. Thorne. She asked the court to strike Timothy's pleadings. Counsel for Timothy argued that Timothy could not afford to pay for the evaluation but produced no evidence of the costs or Timothy's inability to pay. The judge stated that "everything changes" once the parties request a custody evaluation and that it becomes "the path we need to go down . . . ." He orally ordered that the parties create an evaluation schedule and that Timothy bear the costs. He declined to strike Timothy's pleadings at that time but reiterated his order striking Timothy's evidence and ordered Timothy to pay attorney's fees.

We find that the trial court's imposition of a death-penalty sanction in the form of striking Timothy's evidence at this point in the proceedings did not satisfy the applicable standards. First, the record does not reveal a nexus between the misconduct, the offender, and the sanction imposed because the trial court did not attempt to determine whether the misconduct was attributable to counsel, or Timothy, or both. *See TransAmerican,* 811 S.W.2d at 917. A sanction prohibiting

admission of evidence punishes only a party; however, the filing of discovery responses that offer facially irrelevant objections in lieu of valid responses suggests, at minimum, the complicity of counsel. Indeed, the trial court noted that "it's up to the attorneys . . . to answer discovery properly." The sanction thus fails under the first standard. *See Spohn*, 104 S.W.3d at 882 (holding that sanction failed first prong because trial court made no effort to determine whether party or counsel was at fault); *Hernandez v. Polley*, No. 03-15-00384-CV, 2016 WL 6068259, at *4 (Tex. App.—Austin Oct. 13, 2016, no pet. h.) (mem. op.) (same); *cf. Cire*, 134 S.W.3d at 841 (death-penalty sanction upheld where trial court determined that party, not counsel, was responsible for destroying evidence in violation of order to produce evidence).

Second, the sanction imposed was excessive. *See TransAmerican,* 811 S.W.2d at 917. The August 5 hearing was the first hearing regarding Timothy's failure to provide adequate discovery responses and comply with the evaluation order. Although the trial court remarked upon the gross deficiency of Timothy's discovery responses and the significance of the evaluation, the court was required to consider lesser sanctions and explain why lesser sanctions would be ineffective before imposing a death-penalty sanction. *See Cire*, 134 S.W.3d at 841. Rather than considering a lesser sanction, the trial court ordered a death-penalty sanction as a first resort and indicated that it would provide Timothy an opportunity to file a motion for reconsideration upon a showing of compliance. However, the law is clear that death-penalty sanctions are permitted in the first instance only when they are clearly justified and it is readily apparent that no lesser sanctions would promote compliance, and only if the court has fully explained the necessity of the sanction. *See id.*; *Tanner*, 856 S.W.2d at 729. The trial court's indication that it might lift the sanction upon compliance does not satisfy that requirement.

Further, noncompliance with that requirement is particularly problematic in custody cases, in which evidence is critical to determining the child's best interest. *See In re P.M.B.*, 2 S.W.3d at 624 (reversing trial court's exclusion of evidence as discovery sanction under former Rule of Civil Procedure 215(5) in conservatorship case because court did not first attempt lesser sanction). At trial, Timothy made an offer of proof detailing the evidence he would have introduced had he been permitted. That evidence included witness testimony regarding the parties' fitness as parents, which would have been relevant to the best-interest determination. Given the significance of that evidence to proper resolution of the case, the trial court should have attempted lesser sanctions before excluding it. The sanction thus fails under the second standard. *See TransAmerican,* 811 S.W.2d at 917.

Because the order prohibiting Timothy from calling witnesses or introducing documents does not meet the well-settled criteria for imposing death-penalty sanctions, it was an abuse of discretion. We thus sustain Timothy's challenge to the trial court's order excluding his evidence as a violation of Rule 215.2.

2. The trial court's order striking Timothy's pleadings for repeated failure to comply with the evaluation order was not an abuse of discretion

Timothy further contends that the trial court's order striking his pleadings—another death-penalty sanction—was an abuse of discretion. *See* Tex. R. Civ. P. 215.2(b)(5). We disagree.

Despite that Timothy was the party who sought the custody evaluation and attendant case continuation in March 2013, the trial court learned at the November 13 hearing that he had still failed to make any efforts to comply with the agreed evaluation order and the court's oral ruling at

the August 5, 2013 hearing. The court thus ordered that Timothy schedule and complete his appointments by January 14, 2014, and pay Dr. Thorne in full by March 1, 2014. Nevertheless, months after the final deadline, Timothy had failed to comply with any portion of the court's evaluation order. Stephanie filed another motion to compel compliance, and on June 25, 2014, the court gave Timothy yet another opportunity to comply, reiterating the importance of the evaluation to determining A.N.Y.'s best interest. On August 14, 2014, after Timothy had still failed to demonstrate compliance, the trial court entered an order striking his pleadings and his jury demand.

We conclude that the trial court's order striking Timothy's pleadings satisfies the criteria for imposing a death-penalty sanction in a custody case. First, the record shows a nexus between the misconduct, the offender, and the sanction, specifically, that the misconduct was attributable to Timothy. *See TransAmerican,* 811 S.W.2d at 917. The basis of the sanction was Timothy's repeated failure to comply with multiple court orders by refusing to schedule and attend appointments and pay for the ordered custody evaluation. Those responsibilities were personal to Timothy, not his counsel. The trial court repeatedly noted that compliance required Timothy's cooperation with Dr. Thorne. By contrast, the record shows that Stephanie had made considerable effort to comply with the evaluation orders. The evaluation had been a prerequisite to trial, and Timothy's failure to comply had delayed trial for more than a year. Therefore, an order striking Timothy's pleadings bore a direct relationship to his failure to complete the evaluation. *See Hartbrich*, 2002 WL 31476889, at *4 (noting that party's discovery abuse in custody case "prolonging the legal tug-of-war between" the parents "was detrimental to their children" and thus concluding that order striking party's pleadings was in children's best interest).

Second, the sanction was not excessive. *See TransAmerican,* 811 S.W.2d at 917. Before striking Timothy's pleadings, the trial court had given Timothy numerous opportunities to comply and imposed lesser sanctions, which had proven ineffective in promoting compliance with the court's evaluation order. At the August 5 hearing, the trial court ordered that Timothy pay attorney's fees, which did not motivate him to comply. And, although we have determined that the order excluding his evidence was an abuse of discretion, it demonstrated that another lesser sanction—a death-penalty sanction, in fact—was ineffective in compelling Timothy's compliance with discovery orders. *See Cire*, 134 S.W.3d at 841. Indeed, the trial court had ordered Timothy to participate in and pay for the evaluation four separate times before striking his pleadings, and the record contains no indication that Timothy made any effort to comply at any time. Specifically, at the June 25, 2014 hearing, the trial court unequivocally stated that if Timothy did not comply within 45 days, the court would strike his pleadings. Several courts have determined that a clear oral warning of imposition of a death-penalty sanction upon noncompliance may constitute a "lesser sanction" in satisfaction of the second prong. *See Hernandez*, 2016 WL 6068259, at *5 (collecting cases). The record thus establishes the ineffectiveness of lesser sanctions and the necessity of a death-penalty sanction. *Cf. In re P.M.B.*, 2 S.W.3d at 625 (death-penalty sanction improper where trial court did not first attempt lesser sanction).

Furthermore, Timothy's misconduct justified a presumption that his claims or defenses lacked merit. *See TransAmerican,* 811 S.W.2d at 917. At multiple hearings over the course of a year, the trial court emphasized the centrality of the evaluation to effective resolution of the case. At the June 25, 2014 hearing, for example, the trial court explained that "nothing in this case is more

important than [the custody evaluation] right now" and that it would "have a lot of weight on whatever the trier of fact decides." Timothy's continued refusal to participate in the evaluation justifies a presumption that he believed he would receive an unfavorable report. Such a report would have substantially undermined his claim that he should be awarded joint managing conservatorship, the primary objective of his petition. Further, Timothy's refusal to comply despite incurring lesser sanctions permits a presumption that his claims or defenses lacked merit. *See id.* at 918; *Hartbrich*, 2002 WL 31476889, at *4 (holding that party's persistent dilatory discovery tactics supported presumption that party's claim lacked merit); *cf. Spurck*, 396 S.W.3d at 215 (holding that trial court erred in excluding certain testimony, not as sanction, but for party's failure to identify witness in response to discovery request, because child's best interest is primary consideration over "technical rules of pleading and practice"); *R.H.*, 2001 WL 491119, at *8 (same).

Finally, Timothy's continued offensive behavior over the course of the case supports the trial court's order striking his pleadings. *See American Bankers Ins. Co. of Fla. v. Caruth*, 786 S.W.2d 427, 436 (Tex. App.—Dallas 1990, no writ) ("In exercising its discretion in choosing the appropriate sanction, the trial court was not limited to considering only the specific violation committed but was entitled to consider other matters which had occurred during the litigation.") (citing *Medical Protective Co. v. Glanz,* 721 S.W.2d 382, 388 (Tex. App.—Corpus Christi 1986, writ ref'd). The record is replete with instances of Timothy's egregious misconduct, bad faith, and continued refusal to obey judicial directives over the course of the year following the initial sanction prohibiting Timothy from calling witnesses or introducing documents at trial. For example, Timothy was twice held in contempt and jailed for harassing Stephanie on multiple occasions, removing

A.N.Y. from the state without Stephanie's knowledge or consent, and engaging in belligerent behavior around A.N.Y. and other children, all in violation of the court's standing order. At various hearings, the trial judge made several comments regarding the egregiousness of Timothy's misconduct, such as "the course of conduct of this case has been appalling" and that he had "seldom heard of worse violations of [his] standing order." Timothy's repeated violations of numerous court orders reveal a flagrant disregard for authority that further justifies the court's sanction.

On appeal, Timothy again cites counsel's unsworn statements regarding Timothy's inability to pay as demonstrating an abuse of discretion. However, counsel failed to even attempt to prove those statements and offered no evidence tending to show a good-faith effort to comply with any part of the evaluation orders. Such unsupported statements without more, not only do not demonstrate an abuse of discretion, they tend to support imposition of sanctions. *See Koslow's v. Mackie*, 796 S.W.2d 700, 704 (Tex. 1990) (affirming order striking pleadings for failure to submit court-ordered joint pretrial status report and evidence, noting that counsel's unsworn statements did not excuse noncompliance); *Glanz,* 721 S.W.2d at 387 (citing attorneys' unsupported "justifications and excuses" for misconduct as supporting sanctions).

Timothy also observes that the record reveals no additional complaints regarding his deficient discovery responses after the August 5, 2013 hearing. While the record does not indicate whether Timothy eventually provided adequate discovery responses, the record does show that the sanction of striking Timothy's pleadings was also (and ultimately only) based upon Timothy's noncompliance with the evaluation order. Timothy's failure to make any efforts to comply with that order justified a sanction striking his pleadings. Further, even assuming that he eventually complied

with the discovery requests, eventual compliance does not preclude the imposition of sanctions for initial noncompliance. *See Drozd Corp. v. Capitol Glass & Mirror Co*., 741 S.W.2d 221, 223 (Tex. App.—Austin 1987, no writ) (explaining that, because a basis of sanctions is deterrence of violations by other litigants, party's eventual compliance with discovery request does not preclude imposition of sanctions).

Timothy further argues that the trial court abused its discretion by refusing to hold a hearing on Timothy's August 4, 2014 motion for reconsideration.[4] However, the trial court plainly stated at the June 25, 2014 hearing that if Timothy did not fully comply with the evaluation order within 45 days, he would strike his pleadings. Timothy's motion did not allege compliance and instead sought substantial modifications of the order. The court was not required to entertain such a final-hour motion that did not allege efforts to comply.

In sum, Timothy's persistent refusal to comply with the evaluation orders despite multiple admonitions from the court regarding the importance of the evaluation to resolution of the case—in addition to his violations of other court orders—is precisely the type of bad faith, flagrant misconduct for which courts have permitted imposition of death-penalty sanctions. *See Cire*, 134 S.W.3d at 842. Such offensive and dilatory conduct is particularly unacceptable in a child-custody case, in which the status of a child remains uncertain until entry of a final order. *See*

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[4] Timothy argues that he had previously attempted to seek relief from the evaluation order on October 30, 2013. Although he did file a motion for reconsideration of the sanction and modification of the evaluation order at that time, at the November 13, 2013 hearing, counsel for Timothy informed the court that Timothy had arranged a payment plan with Dr. Thorne and would have paid in full by February 2014. Counsel also stated that Timothy was not "bringing forward" the "issue subject to reconsideration" by agreement. Timothy did not seek reconsideration until August 4, 2014, nearly a year later.

Hartbrich, 2002 WL 31476889, at *4. If there is any case in which swift disposition is vital, it is one in which the best interest of a child is at issue. *See id.; see also Commission for Lawyer Discipline of the State Bar of Tex. v. A Texas Attorney*, No. 55619, 2015 WL 5130876, at *3 (Tex. Bd. Disp. App. Aug. 27, 2015, no pet.) (explaining dangers of delay in custody case). Because the trial court acted within its discretion in striking Timothy's pleadings, we overrule Timothy's challenge to that order.

3. The trial court's order striking Timothy's jury demand was an abuse of discretion

Timothy last contends that the trial court abused its discretion in striking his jury demand as a sanction for his misconduct. We agree.

Although Rule 215.2 does not expressly grant trial courts authority to strike a jury demand as a sanction for discovery violations, the rule appears to grant courts broad general discretion in issuing orders to address discovery abuse. *See* Rule 215.2(b) (permitting court to make orders in regard to party's failure to comply with discovery orders or requests "as are just"); *see also Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 184-86 (Tex. 2012) (noting that "[o]ur discovery rules provide a variety of sanctions for discovery abuse," including barring party's participation from damages hearing "if such a sanction is necessary to remedy the abuse"); *In re K.A.C.O.*, No. 14-07-00311-CV, 2009 WL 508295, at *9 (Tex. App.—Houston [14th Dist.] Mar. 3, 2009, no pet.) (mem. op.) (analyzing sanction striking jury demand under *TransAmerican* standard). We conclude, however, that the order striking the jury demand in this case does not satisfy discovery-sanction standards.

Specifically, no nexus exists between Timothy's misconduct and the trial court's order striking his jury demand. *See TransAmerican*, 811 S.W.2d at 917. Although the sanction was properly imposed on Timothy as the offender, the record does not demonstrate how the sanction was aimed to remedy the harm his misconduct caused Stephanie or A.N.Y. *See id.* The order striking Timothy's pleadings, by contrast, limited the number of issues to be litigated, thereby diminishing the burdens borne by Stephanie in preparing for and presenting her claims at trial and expediting a resolution to the case, which was in the best interest of A.N.Y. *See Hartbrich*, 2002 WL 31476889, at *4. But the record establishes no such connection between denying Timothy his constitutional right to a jury trial and curing the prejudice that his misconduct caused the innocent parties. *See* Tex. Const. art. I, § 15.

Furthermore, a showing of a direct nexus between misconduct and striking a jury demand assumes particular importance in cases involving determination of parental rights, in which the legislature has mandated that jury decisions regarding certain custody-related issues are binding upon the trial court. *See* Tex. Fam. Code § 105.002(c)(1). Those issues include appointment of a sole or joint managing conservator, determination of which conservator has the exclusive right to designate the primary residence of the child, and whether to impose geographic restrictions on a child's primary residence, all of which are factual determinations and were strenuously disputed in this case. *See id*. Absent a showing that denying Timothy a jury trial would address the harm resulting from his discovery abuse, he was entitled to have a jury resolve those issues. We thus conclude that denying him that right was an abuse of discretion.

Stephanie contends that the sanction, even if erroneous, was harmless, citing *Halsell v. Dehoyos*, 810 S.W.2d 371 (Tex. 1991) (per curiam). However, *Halsell* concerned the timeliness of a jury demand and not whether a jury demand may be struck as a discovery sanction. See *id.* at 371. Unlike *Halsell*, the trial court in this case did not find, nor does Stephanie contend, that the jury demand was untimely or that the setting of a jury trial would have injured her, disrupted the court's docket, or impeded the court's business. *See id*. (trial court struck jury demand as untimely). We conclude, therefore, the harm analysis in *Halsell* is inapplicable to this case. *See id.; see also Paradigm Oil*, 372 S.W.3d at 187 (reversing judgment after determining that discovery sanction did not satisfy *TransAmerican* standard without conducting harm analysis).

Furthermore, even if the erroneous sanction in this case was subject to a *Halsell* harm analysis, the record establishes that the error was harmful. Under *Halsell*, an erroneous order striking a jury demand is harmless only if the record shows that no material fact issues exist. *See Halsell*, 810 S.W.2d at 372. Suits affecting the parent-child relationship are "intensely fact driven" and involve a best-interest analysis that requires balancing of many factors. *Lenz v. Lenz*, 79 S.W.3d 10, 19 (Tex. 2002). Accordingly, the record in this case reflects the existence of numerous material fact issues regarding conservatorship of A.N.Y., as previously discussed. The denial of a jury trial was thus harmful error. *See Simpson v. Stem*, 822 S.W.2d 323, 325 (Tex. App.—Waco 1992, orig. proceeding) (reversing order denying timely jury demand, noting that "the permanent custody of the children clearly involves factual disputes upon which a jury could pass.").[5]

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[5] *See also G.W. v. Texas Dep't of Family & Protective Servs*., No. 03-14-00580-CV, 2015 WL 658466, at *4 (Tex. App.—Austin Feb. 11, 2015, no pet.) (mem. op.) (holding that order striking jury demand was harmful error because record showed disputed facts surrounding best-interest finding); *In re J.N.F.*, 116 S.W.3d 426, 437 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (holding that order striking jury demand was harmful error because facts disputed regarding appellant's fitness as parent); *cf. Nelson v. Nelson*, No. 01-13-00816-CV, 2015 WL 1122918, at *4

We conclude that the trial court abused its discretion in striking Timothy's jury demand as a discovery sanction under Rule 215.2 and sustain Timothy's challenge to that order.

CONCLUSION

Having determined that the trial court abused its discretion in prohibiting Timothy from calling witnesses and introducing documents at trial and in striking his jury demand, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.[6]

Cindy Olson Bourland, Justice

Before Justices Puryear, Permberton, and Bourland

Reversed and Remanded

Filed: December 15, 2016

(Tex. App.—Houston [1st Dist.] Mar. 12, 2015, pet. filed) (mem. op.) (holding that erroneous denial of jury demand was harmless where appealing party had presented no controverting evidence on fact issues of custody and visitation and had not contested prevailing party's evidence).

[6] All other pending motions in this cause are dismissed as moot.