TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00281-CV

Elicia Bailey, Appellant

v.

Jeremy Gasaway, Appellee

**FROM THE COUNTY COURT AT LAW NO. 4 OF WILLIAMSON COUNTY
NO. 10-3175-FC4, HONORABLE JOHN MCMASTER, JUDGE PRESIDING**

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

In this appeal from a suit to modify the parent-child relationship, Elicia Bailey, acting pro se, appeals from the trial court's final order that appointed Jeremy Gasaway the sole managing conservator of the parties' child, appointed Bailey possessory conservator with child support obligations, and limited Bailey's access and possession of the child to supervised visitation at specified times. For the following reasons, we affirm the trial court's final order.[1]

[1] Pending before this court is Elicia Bailey's motion to admit evidence. She seeks to admit evidence concerning DNA test results from the Williamson County Sheriff's Department. We deny her motion and do not consider the purported evidence. *See Sabine Offshore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979) (per curiam) (explaining that "[a]ffidavits outside the record cannot be considered by the Court of Civil Appeals for any purpose other than determining its own jurisdiction"); *see also Carlton v. Trinity Universal Ins. Co.*, 32 S.W.3d 454, 458 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (confining review to evidence in appellate record and observing that it is "improper for parties to rely on matters outside the record in making arguments to the court"). For the same reason, we do not consider the exhibits attached to Bailey's brief as they are not part of the appellate record.

Background

The parties were divorced in 2011. After the divorce, the parties' only child, who was two years old at the time of the divorce, lived with Gasaway. In the final decree of divorce, the trial court appointed the parties joint managing conservators of the child, ordered Bailey to pay child support to Gasaway of $500 per month, and awarded Bailey possession of the child pursuant to a standard possession schedule after she completed an anger management class and an alcohol assessment approved by the Texas Department of Family and Protective Services. Bailey appealed the final decree of divorce, but her appeal was dismissed for want of prosecution. *See Bailey v. Gasaway*, No. 03-11-00373-CV, 2012 Tex. App. LEXIS 449, at *1 (Tex. App.—Austin Jan. 19, 2012, no pet.) (mem. op.).

This appeal is from Gasaway's suit to modify the parent-child relationship, which he filed in August 2014. *See* Tex. Fam. Code § 156.001 (authorizing court with continuing, exclusive jurisdiction to modify orders providing for conservatorship, support, possession of, or access to child). In his petition, he sought to be appointed sole managing conservator of the child and to limit Bailey's possession and access to the child. He also sought temporary orders. *See id.* § 156.006 (authorizing temporary orders in suit for modification). He alleged that Bailey had violated the terms of possession in the final divorce decree, including by refusing to return the child to Gasaway on August 1, 2014, when one of Bailey's periods of possession had ended. The trial court granted a temporary restraining order against Bailey and held a hearing in October 2014 on Gasaway's request for temporary orders.

At the October 2014 hearing, the parties, Bailey's sister, and a Child Protective Services (CPS) investigator testified about two incidents leading up to Gasaway's petition to modify—a CPS investigation and the parties' subsequent dispute concerning Bailey's return of the child to Gasaway. The CPS investigation was initiated after Bailey filed a report in July 2014 alleging that Gasaway had sexually abused the child. Bailey's report was based on her sister's observations of the child when she and her children were staying with Gasaway at the beginning of July. The sister testified that, on the morning of the incident, she observed the child "getting up with no panties on and crying" and "asking where her dad was." The sister testified that Gasaway had left for a few hours to go to work, the child was sleeping in Gasaway's bed and that, after the child woke up and was crying, the sister found the panties in the bed and that they had a "very nasty sexual smell." In his testimony, Gasaway did not deny that the child had been sleeping in his bed without wearing panties, but he explained that the child was "having accidents at that time" and would get out of her own bed, remove her panties when she had an accident, and "then climb in bed" while he was asleep but that she "did have on her nightgown and everything." The CPS investigator testified that the allegation in the report was "ruled out" and that there were no concerns with the child being with Gasaway from the "CPS standpoint." She also testified about her beliefs that Gasaway was a good father and that it was in the best interest of the child for him to be the sole managing conservator.

The other incident leading up to Gasaway's petition to modify occurred in August 2014 when Bailey had possession of the child. After Bailey refused to return the child to

Gasaway or communicate with him, Gasaway was able to locate them some days later at a store.[2] When Bailey saw Gasaway, she called the police and told them that Gasaway was "stalking" her. The witnesses testified consistently that, after the police and the CPS investigator arrived at the store, the CPS investigator assisted with returning the child to Gasaway.

Gasaway also testified that Bailey's visitation with the child had been inconsistent after the divorce and that she had failed to pay child support. In 2013, Gasaway had released over $13,000 in unpaid child support that Bailey owed to him, and she was unemployed and owed approximately $1,720 in additional child support at the time of the October 2014 hearing. Gasaway further testified about Bailey's history of violent behavior, including that she had assaulted him and another person, and described the therapy that the child received because of the child's diagnosis of autism. Bailey testified that she "[didn't] think [the child]'s autistic," that the child was "fine" when she was around Bailey, and that Bailey "could care less about a court order when it comes to the safety of [her] child." She admitted to various violations of the trial court's orders—including failing to comply with child support obligations and drug testing as ordered—and to smoking marijuana, "probably about three or four months ago."

Following the hearing, the trial court entered temporary orders appointing Gasaway as the temporary sole managing conservator and Bailey as the temporary possessory conservator of the child. The trial court also limited Bailey's access to the child to supervised visitation and

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[2] The parties disputed whether Bailey's period of possession had ended. Bailey testified that Gasaway had agreed to let her have the child for the "entire summer," but she admitted that she did not return Gasaway's calls at that time, explaining that she "chose to protect [her] child." In her briefing, Bailey explains that she "refused to return the child to [Gasaway] after she was made aware of the abuse."

electronic communication at specified times. Gasaway was responsible for up to $200 of the supervised visitation cost "so long as [Bailey had] paid her entire $500.00 in child support in that month."

The trial court held review hearings in February 2015 and May 2015. No witnesses were presented at the February 2015 hearing, but both parties were present. Bailey had recently retained counsel, and the trial court updated her attorney on the status of the case and the court's concern with Bailey's "hostility to Court orders." During the hearing, Gasaway also raised concern with the court about statements that Bailey had been making to the child when speaking to the child by phone, such as "Daddy went to court so you can't come to my house anymore because the Court said daddy is trying to keep us apart." At the conclusion of the hearing, the court warned Bailey's attorney that "this might be her last best chance before I start putting in some really restrictive provisions to protect the child," and the attorney assured the court that Bailey would comply with court orders going forward.

The witnesses at the May 2015 review hearing were the parties, an investigator from the Williamson County sheriff's office, and a program director from LifeSteps, a visitation service provider. The witness from the sheriff's office testified that the preliminary testing on the child's panties was negative for semen and that the child had not made an outcry when interviewed at the Child Advocacy Center. The program director from LifeSteps testified about the termination of services for Bailey based on her conduct—violating policies and procedures and "confrontational and aggressive incidents"—but that the program would reconsider supervising visits. Gasaway testified about statements that he heard Bailey make to the child during phone conversations that

occurred after the February 2015 hearing, such as "daddy is trying to keep us apart" and "things of that nature." Bailey testified that she was employed, admitted that she was behind on child support payments and that she made some of the complained-of statements to the child, but she denied that she made others. At the conclusion of the hearing, the trial court warned Bailey that this was her "last chance" and that he would be "cutting" access next if she continued to talk about the litigation with the child.

Following the May 2015 hearing, the trial court also entered further temporary orders. The trial court enjoined the parties "from discussing the litigation with the child or within her presence, implying that the other party is the reasons the visitation is supervised, making disparaging remarks about the other party, or making false allegations of abuse" and ordered Bailey to pay for the supervised visits at her own expense and to pay Gasaway the $500 in child support "without any credit for supervision as previously ordered."

The final hearing occurred in December 2015. The witnesses at the final hearing were the parties. The primary disputes concerned the reasons that Bailey had not visited with the child and statements that she made to the child during recorded telephone conversations after the May 2015 hearing. Bailey had not had visits with the child after July 2015 because, according to her, she could not afford LifeSteps. Both parties also testified about the phone conversations, and the exhibits included recordings of portions of the phone conversations. Gasaway testified that he recorded the conversations and that he and the child were listening during the conversations. In the conversations, Bailey told the child that it is the "judge at the court" and "your dad" that were trying to keep them apart and told Gasaway that he was "gonna go to prison. Soon." When Gasaway

warned her that discussing the litigation was a violation of the court order, she responded that she did not care what he or the judge said.

In April 2016, the trial court signed the final order granting Gasaway's suit to modify the parent-child relationship. In the order, the trial court found that "the following orders are in the best interest of the child" and ordered the appointment of Gasaway as sole managing conservator; the appointment of Bailey as possessory conservator; and modification of Bailey's access to supervised visitation at specified times. The trial court also terminated all electronic communication between Bailey and the child. As support for its orders concerning supervised visitation, the trial court found that "credible evidence has been presented that Elicia M. Bailey has a history or pattern of child neglect directed against [the child]." The trial court also entered findings of fact and conclusions of law. This appeal followed.[3]

Analysis

Bailey presents five issues on appeal. She, however, generally fails to support her issues with substantive arguments or citations to authorities or the record. *See* Tex. R. App. P. 38.1(i) (requiring "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *see Davis v. American Express Bank*, No. 03-12-00564-CV, 2014 Tex. App. LEXIS 9662, at *7 (Tex. App.—Austin Aug. 29, 2014, no pet.) (mem. op.) (noting that "[a]ppellate issues must be supported by argument and authority, and if they are not so supported, they are waived"); *Lee v. Kaufman*, No. 03-10-00148-CV, 2011 Tex. App. LEXIS 6969,

[3] Although Bailey was represented by counsel at times in the underlying proceeding including during the final hearing in December 2015, she is acting pro se on appeal.

at *9–10 (Tex. App.—Austin Aug. 26, 2011, no pet.) (mem. op.) (finding issue waived that was not supported "with arguments, legal authority, or citations to the record"). "[P]ro se appellants are held to the same standard as parties represented by counsel to avoid giving unrepresented parties an advantage over represented parties." *Stewart v. Texas Health & Human Servs. Comm'n*, No. 03-09-00226-CV, 2010 Tex. App. LEXIS 9787, at *2 n.1 (Tex. App.—Austin Dec. 9, 2010, no pet.) (mem. op.). Holding Bailey to this standard, we conclude that she has waived her issues by failing to support them with substantive arguments or appropriate citations to authorities and the record. *See* Tex. R. App. P. 38.1(i). Nonetheless, we will attempt to address her issues as best we understand them. *See Stewart*, 2010 Tex. App. LEXIS 9787, at *2 n.1 (addressing pro se appellant's "complaints as best we can").

2011 Divorce Proceeding and Other Suits

In her first issue, Bailey argues that "[t]he trial court showed prejudice and deprived [her] of her constitutional rights when it denied [her] motion for continuance after her attorney's sudden withdrawal." The trial court, however, denied this motion in the 2011 divorce proceeding. In other places in her brief, she also complains about provisions in the 2011 divorce decree, such as the division of the marital estate and the amount of her child support obligation, and she challenges the trial court's denial of a petition that she filed in October 2013, seeking to reduce the amount of her child support obligation. She further complains about trial court rulings in subsequent modification suits that she filed after she perfected the appeal in this case, including contending in her fourth issue that "[t]he trial court made error and abused its discretion when it did not recuse

itself"[4] and in her fifth issue that "[t]he trial court made error when it did not hear a motion to modify after it had been properly filed and served."[5]

"As with other final, unappealed judgments which are regular on their face, divorce decrees and judgments are not vulnerable to collateral attack." *Hagen v. Hagen*, 282 S.W.3d 899, 902 (Tex. 2009). "Errors other than lack of jurisdiction over the parties or the subject matter render the judgment voidable and may be corrected only through a direct appeal." *Id.* (citing *Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003)). This Court dismissed her appeal from the 2011 divorce decree, *see Bailey*, 2012 Tex. App. LEXIS 449, at *1, and she may not collaterally attack the 2011 divorce decree in this appeal, *see Hagen*, 282 S.W.3d at 902; *Reiss*, 118 S.W.3d at 443.

Further, this Court does not have jurisdiction to consider her complaints about the trial court proceedings concerning her 2013 and 2016 petitions to modify the parent-child relationship. Bailey's notice of appeal in this case identifies the trial court's judgment that was signed on April 7, 2016, as the judgment that she is appealing. *See* Tex. R. App. P. 25.1 (setting

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[4] In Bailey's suit seeking to modify the parent-child relationship that she filed in May 2016, Bailey filed a motion to recuse the trial judge on July 13, 2016, the trial court signed an order on July 20, 2016, denying the motion to recuse, and a judge assigned by the regional administrative judge also signed an order on August 10, 2016, denying the motion to recuse. *See* Tex. R. Civ. P. 18a. To the extent Bailey is complaining about bias by the trial court in the underlying proceeding of this appeal, she has failed to preserve error. *See id*. (requiring verified motion asserting one or more grounds listed in rule 18b and not "based solely on the judge's ruling in the case"); *see also Barron v. State Attorney Gen.*, 108 S.W.3d 379, 382 (Tex. App.—Tyler 2003, no pet.) (noting that procedural requisites for recusal in rule 18a(a) are mandatory and that "party who fails to conform waives his right to complain of a judge's failure to recuse himself").

[5] Bailey appears to be referencing her suit seeking to modify the parent-child relationship that she filed in May 2016. She also filed a petition to modify the parent-child relationship in September 2016. In her fifth issue, she argues that the trial court should have heard her suit to modify in September 2016 and that it abused its discretion by requiring her to post a bond "after it should have recused itself."

forth requirements for perfecting appeal); *see generally* Tex. Fam. Code §§ 156.001–.410 (addressing procedures for suits to modify orders providing for conservatorship, support, or possession of and access to child). Thus, we may not consider her complaints about those separate proceedings in this appeal.

On these bases, we overrule Bailey's first, fourth, and fifth issues.

Conservatorship and Possession and Access to the Child

In her second issue, Bailey argues that the trial court erred and abused its discretion when it granted Gasaway sole managing conservatorship and "lacked sufficient evidence when it restricted [Bailey]'s rights to the child." She asserts that the trial court must have improperly restricted her possession and access to the child, including the termination of electronic communications, based on its determination that she filed a false report that Gasaway had sexually abused the child. *See* Tex. Fam. Code § 261.107(b) (authorizing court in suit affecting parent-child relationship to restrict access to child by person who knowingly makes false report of child abuse or neglect). Bailey urges that this basis was improper because she was required to file the report when she had "reason to believe the child [was] being abused and she acted accordingly." *See id.* § 261.101(a) (describing when report of child abuse or neglect is required). She also argues that it was "uncontested that the child showed swift and considerable developmental improvement within the two and a half weeks she was with [Bailey] in July and August 2014" and that she has never seen signs of autism in the child.

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 best interest of the child. *Id.* § 156.101(a)(1). When a trial court makes a decision modifying conservatorship, we review that decision under an abuse-of-discretion standard. *See Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982) (giving trial court "wide latitude in determining the best interests of a minor child"); *Zeifman v. Michels*, 212 S.W.3d 582, 587 (Tex. App.—Austin 2006, pet. denied) (reviewing trial court's decision to modify conservatorship under abuse of discretion standard and describing that standard of review). The trial court, the observer of "the witnesses' demeanor and personalities," does not abuse its discretion "as long as some evidence of a substantive and probative character exists to support the trial court's decision." *Zeifman*, 212 S.W.3d at 587.

In its findings of fact, the trial court found that there had been a material and substantial change in the circumstances of the child and a conservator after the date the prior order was rendered, and Bailey has not specifically challenged this finding on appeal. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986) (explaining that unchallenged findings of fact "are binding on an appellate court unless the contrary is established as a matter of law, or if there is no evidence to support the finding"). Gasaway also presented evidence concerning the parties' relationships with each other and the child after the parties were divorced in 2011, including evidence of Bailey's inconsistent visitation with the child, her statements to the child that violated the trial court's orders, and her refusal to return the child to Gasaway in August 2014 after her period of possession had ended. This evidence is sufficient to support the trial court's finding of a material and substantial change. *See id.*; *see also McAleer v. McAleer*, 394 S.W.3d 613, 620 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (concluding that it was bound by unchallenged finding of

fact because "there [was] some evidence in the record supporting this finding"); *see also In re Marriage of Koenig*, No. 14-16-00319-CV, 2017 Tex. App. LEXIS 5747, at *9 (Tex. App.—Houston [14th Dist.] June 22, 2017, no pet.) (mem. op.) (explaining that "court is not confined to rigid or definite guidelines in determining whether a material and substantial change has occurred" and listing material changes that can support modification); *Arredondo v. Betancourt*, 383 S.W.3d 730, 734–35 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (explaining that whether a material and substantial change of circumstances has occurred "is fact specific and must be made according to the circumstances as they arise" and listing material changes that may support modification).

Similarly, the trial court found that it was in the child's best interest to appoint Gasaway sole managing conservator and to limit Bailey's possession and access to supervised visitation. Construing Bailey's arguments as challenges to the trial court's best interest findings, we conclude that the evidence was sufficient to support the trial court's best interest findings. *See Zeifman*, 212 S.W.3d at 587; *see also Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (listing non-exclusive factors for making best interest determination including "emotional and physical danger to the child now and in the future" and "acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one"); *Hinojosa v. Hinojosa*, No. 14-11-00989-CV, 2013 Tex. App. LEXIS 4504, at *20 (Tex. App.—Houston [14th Dist.] Apr. 9, 2013, no pet.) (mem. op.) ("[A] trial court is permitted to place conditions on a parent's access, such as supervised visitation, if necessary for the child's best interest . . . ."). Gasaway's evidence included that Bailey had not exercised visitation with the child and that she had been unable

or unwilling to follow court orders, including making improper statements to the child after being warned by the trial court of the consequences of doing so.

Based on our review of the record, we conclude that the trial court did not abuse its discretion by modifying conservatorship to appoint Gasaway as the sole managing conservator of the child and limiting Bailey's possession and access to the child to supervised visitation without electronic communication. *See Zeifman*, 212 S.W.3d at 587; *see also In re O.G.*, No. 05-13-01263-CV, 2014 Tex. App. LEXIS 7021, at *7 (Tex. App.—Dallas June 26, 2014, no pet.) (mem. op.) (explaining that "question of conservatorship of a child is left to the trial court's discretion because it is in the best position to observe the demeanor and personalities of the witnesses and can feel the forces, powers, and influences that cannot be discerned by merely reading the record" (citation and internal quotations omitted)); *Hinojosa*, 2013 Tex. App. LEXIS 4504, at *20. We overrule Bailey's second issue.

Findings of Fact and Conclusions of Law

In her third issue, Bailey argues that the trial court erred when it made its findings of fact and conclusions of law because it "failed to provide evidence or explanations of how it made its findings of fact or state in particular, how it came to its conclusions of law." A trial court, however, is not required to detail the evidence or explain how it made its findings of fact or to provide an explanation of its conclusions of law. *See* Tex. R. Civ. P. 297–299; *see also Rich v. Olah*, 274 S.W.3d 878, 886 (Tex. App.—Dallas 2008, no pet.) (stating that trial court is not required to make additional findings of fact "that are evidentiary"). Rather, a trial court's findings of fact are subject to review for legal and factual sufficiency of the evidence by the same standards

applied to a jury verdict. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *see City of Keller v. Wilson*, 168 S.W.3d 802, 807, 810, 822 (Tex. 2005) (describing review of evidence under legal and factual sufficiency standards of review). And we review a trial court's conclusions of law de novo and will uphold the conclusions if the judgment can be sustained on any legal theory supported by the evidence. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

Bailey also argues that the trial court's "findings and conclusions lack substantial evidence and are erroneous in their entirety," "denies all allegations against her," and specifically challenges the following findings of fact:

- There is credible evidence of a history or pattern of past or present child neglect or emotional abuse by Elicia Bailey directed against the child . . . .
- There is also credible evidence of false accusations made by Elicia Bailey alleging that Jeremy Gasaway sexually abused the child and the Court has concerns that it is likely that Elicia Bailey would make similar accusations against Jeremy Gasaway in the future and try to persuade the child that Jeremy Gasaway sexually abused her.
- Elicia Bailey failed to exercise her possession and access granted to her under the Court's temporary orders for an extended period of time when there was no legitimate impediment to her exercising visits.
- Elicia Bailey is unable to follow court orders and injunctions regarding conservatorship, possession and access, or child support.
- The periods of possession vary from the Standard Possession order for the following reasons: . . .

    e) Elicia Bailey's frequent outbursts and disrespectful behavior in court that indicates an inability to conduct herself appropriately even when under scrutiny;

    . . .

> i) the credible evidence that Elicia Bailey suffers from undiagnosed mental health issues that impedes [sic] her ability to parent the child in a healthy manner;
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> j) Elicia Bailey's refusal or inability to work consistently with a mental health professional or submit to a court ordered psychological evaluation; [and]
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> . . .
>
> n) Elicia Bailey's inability to model good behavior for her own child.

As support for her challenges to these findings, Bailey relies on evidence that is not in the record and continues to make similar factual assertions to the ones that she made to the trial court. She asserts that "there is enough evidence to support that [Gasaway] sexually abused the child"; that "the [trial] court's ruling was the legitimate impediment" to her failure to exercise visitation; that she "will not consistently work with a mental health professional when there is no necessity for it"; and that "[i]t is uncontested that the child learns and develops much quicker when she is in [Bailey]'s care." She also asserts that she "has not knowingly and purposely violated any court orders" and provides explanations for her failure to follow court orders, such as her failure to make child support payments because "she was unemployed."

We, however, may not consider evidence that is not part of the record. *See Sabine Offshore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979) (per curiam); *Carlton v. Trinity Universal Ins. Co.*, 32 S.W.3d 454, 458 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). It also was for the trial court to resolve the conflicts in the evidence and to judge the credibility of the witnesses and the weight to be given to their testimony. *See McGalliard*, 722 S.W.2d at 697 (explaining that trier of fact may believe one witness and disbelieve others when

faced with conflicting evidence and it may resolve inconsistencies in testimony of any witness); *Zeifman*, 212 S.W.3d at 587; *see also City of Keller*, 168 S.W.3d at 819. Thus we defer to the trial court's credibility determinations and its resolution of conflicts in the evidence in favor of its findings. Moreover, based on our review of the evidence, we have concluded that the evidence was sufficient to support the trial court's finding of material and substantial change and its best interest findings as to conservatorship and access and possession of the child. *See Zeifman*, 212 S.W.3d at 587. On these bases, we overrule Bailey's third issue.

Conclusion

Having overruled Bailey's issues, we affirm the trial court's final order.

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Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Pemberton and Goodwin

Affirmed

Filed: August 22, 2017