TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00381-CV

Bramlette Holland Browder, Appellant

v.

Rachel Moree and Clarence Dean Hinds, Jr., Appellees

FROM THE 261ST DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-FM-17-002349, THE HONORABLE KARIN CRUMP, JUDGE PRESIDING

MEMORANDUM OPINION

Bramlette Holland Browder appeals the trial court's final order rendered after a bench trial in this Suit Affecting the Parent-Child Relationship (SAPCR). Browder filed a petition seeking conservatorship and possession of Kelly,[1] the biological daughter of Rachel Moree and Clarence Dean Hinds, Jr. Browder is unrelated by blood or marriage to Kelly but had cohabited with Moree before filing his suit. The trial court commenced the final hearing November 26, 2018, hearing one of Browder's expert witnesses, and recessed until March 4, 2019. In a final order, the court found in Kelly's best interest that Moree be appointed sole managing conservator and Hinds possessory conservator but did not find in Kelly's best interest that Browder be appointed as conservator. In three issues, Browder contends that the trial court exhibited "extrajudicial prejudice" against him and in favor of Moree throughout trial;

[1] For purposes of privacy, we will refer to the child by a pseudonym.

improperly denied his demand for a jury trial; and considered unadmitted, extrinsic evidence to support its judgment. For the following reasons, we will affirm the trial court's final order.

BACKGROUND

Evidence showed that Hinds abandoned Moree and Kelly after Kelly's birth and has never emotionally or financially supported Kelly. When Kelly was two, Browder and Moree became romantically involved after meeting on a dating website. Moree and Kelly moved in with Browder shortly thereafter, and Browder became a father figure to Kelly, who has special medical needs that require considerable medical attention. Moree and Browder resided together for six years, during which time Moree did not work and Browder provided financially for Moree and Kelly.

In April 2017 Browder and Moree separated and Moree and Kelly moved out. Browder filed this SAPCR seeking rights to Kelly. After an August 2017 hearing and before Hinds had answered or appeared in the suit, the court signed agreed temporary orders appointing Moree temporary managing conservator and Browder temporary possessory conservator of Kelly with visitation the second weekend of each month. Per the temporary orders, the parties agreed to submit to a custody evaluation with a psychological component with Browder responsible for the full cost of the evaluation for both parties. The court also appointed a guardian ad litem for Kelly.

On September 26, 2018, Browder filed a notice of trial setting, copied to Moree's attorney and Hinds, stating that "this matter has been set for trial on November 26, 2018." Trial to the court began on November 26, 2018. Kelly was nine. Hinds appeared pro se after not

having answered or appeared previously.[2] The trial court questioned Hinds about whether he was aware that Browder's then-live (third amended) petition sought to terminate his parental rights. Hinds responded, "Yes, ma'am. That is why I showed up today because I've never had a chance to be in [Kelly]'s life . . . [and] I wanted to come down here today and just make it known that I do not want to give up my rights, and I would like to be in [Kelly]'s life." Browder conceded that he was willing to waive his termination request and have the court grant Hinds possessory rights. When the trial court asked whether Hinds was "ready to proceed today," he replied that he was not and would like some "time to get an attorney." The trial court clarified, "So are you asking for a continuance of the trial today?" "Yes," replied Hinds. The trial court asked Browder whether the waiver of his termination request was contingent on proceeding to trial that day to which Browder replied that it was not—that "if the father wants to be a part of this child's life, I don't think anybody is opposed to that"—but that "as far as a continuance goes . . . the return of service has been on file for . . . 14 months [and] [Hinds has] had ample opportunity to . . . seek counsel."[3]

The trial court then inquired about the witnesses that Browder and Moree intended to call and confirmed that the agreed temporary orders granted possession of Kelly to Browder for one weekend each month but that the guardian ad litem, Christa Coker, was recommending that Browder and Moree have a "50/50 [possession] schedule." Coker confirmed that her 50/50 recommendation "endorse[s] the extremely thorough recommendations

[2] Browder's counsel and the court appeared to be in agreement that a return of service was on file indicating Hinds was personally served in September 2017, but the clerk's record does not contain a return of service for him.

[3] For most of the time this cause was pending, Browder sought that Hinds be appointed possessory conservator; Browder first made a request for termination of Hinds's parental rights shortly before the November 26 trial.

of Dr. Sherry . . . , [who] did a full child custody evaluation." When the trial court asked whether Dr. Sherry's recommendations had been filed, Browder replied that they had not—"based on some of the sensitive information contained" therein—but offered the court a copy to review, which the court accepted.

The trial court stated that it wanted to give Hinds an opportunity to hire counsel but also noted that at least one of Browder's witnesses, Dr. Amy Eichler—an expert on "parental alienation"—was present in the courtroom. The trial court took a "brief recess" to "review Dr. Sherry's report, and the guardian [ad litem]'s report and make a decision as to whether it would be appropriate to continue the case, given . . . Hinds'[s] attendance here today," to which neither party objected. The court asked whether there "was any caselaw to support a theory of alienation with a nonparent" so that it could determine whether Dr. Eichler's testimony "would be relevant" to its considerations in the dispute. Browder's counsel stated that she would search for caselaw during the recess.

After the recess, Browder's counsel identified a case for the court in which, counsel argued, the appellate court addressed alleged "psychological abuse of the child and the bonding attachment issues and alienation issues" between a stepparent and biological parent. *See In re R.T.K.*, 324 S.W.3d 896, 898, 903–04 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). After Moree's counsel pointed out that Browder is "not a stepparent," the trial court observed that Browder had "just a boyfriend relationship" and "there is a difference in law in terms of a stepparent, and what the rights are, under statute. Nevertheless, I will allow the testimony of Dr. Eichler this morning and here's what I want to do, because Dr. Eichler's testimony doesn't involve [Hinds] directly." The court continued, "I can hear [Dr. Eichler's] testimony this morning without [Hinds] really needing to participate in the cross-examination. But then I'm going to

recess this case. When you-all have time, to come back, given the number of witnesses, I also want to—there is a request for interview of the child; is that correct?" (Emphasis added.) Moree's counsel answered, "we were going to see how it went. It's possible, and the child is getting older and I wanted to check once again with [her] counselor." Before hearing Dr. Eichler's testimony, the trial court admonished Hinds: "[I]t's extremely important that you make sure that you stay involved in this case" because Hinds could "lose any rights" to the child if he did not appear when trial resumed.

The parties and court discussed setting a date to resume trial during a non-jury week in March 2019. Browder's counsel expressed concern about that timeline because when the parties had appeared before a visiting judge to hear Browder's motion to modify the temporary orders (to allow him more possession of Kelly), that judge had deferred hearing the motion but instead "short set" the trial setting to afford the parties resolution of the custody and possession issues before the holidays. Browder's counsel continued, "now I fear that we're going into the holidays and [this trial] is going to get kicked into next year and my client is not going to have any holiday access with what he considers to be his child." After further discussion between the court and the parties, the trial was ultimately scheduled to resume March 4–6, 2019.

Browder called Dr. Eichler to testify. When Browder's counsel used the term "parental alienation" to ask Dr. Eichler to explain "the psychological effects on a child when one parent speaks ill of the other parent or tries to destroy that attachment," the trial court sustained Moree's objection that "these aren't parents." When Browder tried to rephrase the question still using the word "parent," Moree objected again, and the trial court stated, "I think the word that you used previously, caretaker, is more appropriate in this circumstance." After Moree examined Dr. Eichler on voir dire, during which Dr. Eichler explained that "alienation is a form

of psychological abuse," Browder conceded that "we'll use the word psychological abuse of the child rather than parental alienation.

After Dr. Eichler's testimony concluded, the trial court took up the issue of Browder's request to modify the temporary orders to allow him more possession of Kelly, particularly over the upcoming holidays. Because the parties could not agree to a holiday schedule at the hearing, the trial court set a hearing for December 17 to "take up the issue of [Kelly's] medical situation" and determine a holiday schedule if the parties were unable to reach an agreement.

Four witnesses, including Moree and Browder, testified at the December 17 hearing. At its conclusion, the trial court denied Browder's request to modify the temporary orders and grant him extra holiday access to Kelly because "[i]t is a very, very high bar to amend a temporary order, and there is simply not sufficient evidence for this Court to amend the temporary orders that were agreed to by the parties." The court also denied Moree's request for a temporary injunction seeking to restrain various actions by Browder including his contacting Kelly's medical providers.

Trial resumed March 4–6, 2019. Moree, formerly represented by counsel, appeared pro se at the March trial setting. Hinds did not appear. The following witnesses testified: Moree, Browder, the counselor who treated Moree and Browder as a couple and individually, Dr. Sherry, and Moree's stepmother. The trial court requested that Kelly be brought to court for a private in-chambers interview, which occurred on the last day of trial and was not transcribed, without objection. At the trial court's request, Browder filed his fourth amended (live) petition at the end of the trial, in which he formally abandoned his request to terminate Hinds's parental rights and sought, instead, to have Hinds appointed as a possessory conservator. Browder also

prayed that he be appointed sole managing conservator or, alternatively, that he and Moree be appointed joint managing conservators of Kelly.

On March 8, the trial court rendered its final order appointing Moree as the sole managing conservator of Kelly and Hinds as a possessory conservator with possession periods solely at Moree's discretion. The court ordered Hinds to pay Moree child support and provide health insurance for Kelly. Browder was granted no conservatorship rights. On April 4, 2019, the court issued findings of fact and conclusions of law in support of its judgment.

On April 4, 2019, Browder filed a motion to recuse the trial judge, which was heard and denied by a different judge.[4] The next day he filed a motion to set aside the final order and for new trial, which was overruled by operation of law. He then filed this appeal.

DISCUSSION

Whether the trial court exhibited prejudice against Browder

In his first issue, Browder contends that the trial judge exhibited "extrajudicial prejudice" against him throughout trial; acted as an advocate for pro se Moree; and departed from her role as a neutral arbiter. He contends that the lack of the trial judge's impartiality was so severe that it affected the structural framework of the trial, requiring the presumption of harmful error and automatic reversal. *See In re L.S.*, No. 02-17-00132-CV, 2017 WL 4172584, at *21 (Tex. App.—Fort Worth Sept. 21, 2017, no pet.) (mem. op.) (holding that trial judge's "deep-seated antagonism for Father, which was shown on the face of the record, deprived Father

[4] The "Order Denying Motion to Recuse with Findings of Fact and Conclusions of Law" stated, "This case recessed for nearly two and one half months—until March 4, 2019. . . . During that time no Motion pursuant to Rule 18a of the Texas Rules of Civil Procedure was filed. . . . This case continued to be heard on the Merits on March 4, 5, and 6, 2019." The ruling on the motion was not made part of this appeal.

of a fair trial before an impartial fact-finder and resulted in fundamental and harmful error" and remanding for new trial before different trial judge); *see also In re K.R.*, 63 S.W.3d 796, 800 (Tex. 2001) (noting that "structural" errors, including "trial before a judge who was not impartial," defy analysis by "harmless-error standards").

Browder alleges that the following conduct and comments of the trial judge[5] demonstrate her bias and prejudice against him:

- Sua sponte granting a "continuance" at the November 26 hearing over Browder's objection to allow Hinds time to find counsel and prepare for trial, when Hinds had not participated in the suit previously.

- Questioning Hinds about his intentions for Kelly yet "never questioning him about why he failed to respond to the suit for fourteen months."

- Sustaining Moree's objections to Dr. Eichler's testimony on parental alienation because Browder was only a "boyfriend" and "forcing" Dr. Eichler to use more distant terms such as "caretaker" when discussing the effect on Kelly of losing contact with Browder.

- After the conclusion of the December 17 hearing, denying Browder's request for possession of Kelly near Christmas and ordering him not to contact Kelly's medical providers.

- Refusing to admit, despite no objection from Moree, Moree's dating ad on the website through which the parties met unless Browder also "show[ed]" the court his ad because the court "didn't want just one snippet" from "many years ago."

- "Ignoring" the fact that Kelly has called Browder "daddy" since she was three years old.

- Asking "over 250 questions to six witnesses," including questions to elicit "additional information that neither party addressed."

- Sua sponte objecting for Moree by asserting that a question Browder asked Moree required "speculation." After Browder asserted that Moree "can object on her own behalf," the trial court responded, "I'm here to ensure the Court receives information that

[5] The judge—the Honorable Karin Crump—who conducted both the December 17, 2019 hearing on Browder's motion to modify temporary orders and the trial, and who rendered final judgment, was a different judge from those who conducted other pre-trial hearings and ruled on other pre-trial motions.

is admissible, and so if the pro-se litigant can't do that on her own, it's my obligation to ensure that only admissible testimony is received."

- Instructing the court staff attorney to reach out to Hinds "ex parte" during the trial to inform Hinds that the trial was in progress while "chastising" Browder for reaching out to Hinds directly himself in the interim between the November hearing and the March trial.

- "Inappropriately beginning to instruct Browder on his Fifth Amendment rights" when Browder's counsel instructed him not to divulge any privileged attorney-client communications after the trial court inquired of Browder whether he thought it was "appropriate" to reach out to Hinds directly.

- "Continuously coaching" Moree on how to handle the litigation.

- Engaging in "extensive direct examination" of Moree over Browder's objections.

- Sustaining the judge's own sua sponte objections.

- Becoming "irate" with Browder's counsel for objecting to one of the judge's questions on hearsay grounds.

- Making findings of fact based on unsworn statements Hinds made before trial began.

- Awarding Hinds status as possessory conservator even though he filed no pleadings, had been in default for fourteen months, failed to work with the guardian ad litem, abandoned Kelly after her birth, and failed to appear for the final trial.

- Denying Browder's "every request" for relief made in this suit, effectively removing him from Kelly's life "despite [his] years of financial support and emotional support."

Browder contends that the sum of the above-referenced complaints demonstrates the trial judge's "animus" and prejudice towards him, which began when the judge "learned of the origin of Browder and Moree's relationship"[6] at the March trial. However, as explained below, Browder's selective citation to various instances in the record does not demonstrate prejudice or animus, considering the entire record. We conclude that, on balance, the judge interacted even-handedly with both parties—sometimes ruling in Browder's favor and treating

[6] Moree testified that the dating website through which she and Browder met is www.seekingarrangement.com, also known as the "sugar daddy site."

him more favorably than Moree—and that the judge's rulings, questioning of witnesses, and guidance to pro se Moree were consistent with the trial court's statutory duty to adjudicate Kelly's best interest. *See* Tex. Fam. Code § 153.002 ("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.").

Texas Rule of Evidence 611(a) provides that the court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth, (2) avoid wasting time, and (3) protect witnesses from harassment or undue embarrassment. Tex. R. Evid. 611(a). "The trial court's 'inherent power,' together with applicable rules of procedure and evidence, accord trial courts broad, but not unfettered, discretion in handling trials." *State v. Gaylor Inv. Tr. P'ship*, 322 S.W.3d 814, 819 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citations omitted).

A trial judge should not act as an advocate for any party. *Henderson-Bridges, Inc. v. White*, 647 S.W.2d 375, 377 (Tex. App.—Corpus Christi 1983, no writ). However, the trial judge neither steps out of nor abandons her role as a neutral factfinder by examining the parties or witnesses either on examination in chief or on cross-examination. *See Stewart v. State*, 438 S.W.2d 560, 562 (Tex. Crim. App. 1969). Where evidence has not been brought out, where testimony requires clarification, or where anything material has been omitted, the trial judge may ask competent and material questions. *See Henderson-Bridges*, 647 S.W.2d at 377; *Hudson v. Hudson*, 308 S.W.2d 140, 142 (Tex. App.—Austin 1957, no writ) (concluding that trial court's "vigorous" examination of witnesses "at considerable length" in bench trial was within judge's "sworn duty to administer justice," did not operate as advocacy for either party, and was proper because questions were regarding "matters bearing on the issue" to be decided). While Moree's

pro se appearance in the continuation of the trial likely contributed to the judge's need to ask questions of her to elicit information the judge believed material to the court's deliberations, we do not view the judge's questioning as advocacy for Moree but, rather, as a necessary exercise of the judge's role to elicit material evidence. *See Henderson-Bridges*, 647 S.W.2d at 377. Such role is "of particular importance during a bench trial when the best interest of the children is at stake." *In re E.M.*, No. 02-18-00351-CV, 2019 WL 2635565, at *3 (Tex. App.—Fort Worth June 27, 2019, no pet.) (mem. op.) (citing *Trahan v. Trahan*, 732 S.W.2d 113, 114–15 (Tex. App.—Beaumont 1987, no writ) ("If the attorneys fail to develop the facts, it is the trial judge's responsibility to the children to attempt to do so himself.")). That some of the answers to the judge's questions may turn out favorably or unfavorably to either party does not ascribe wrongful motives or partiality to the court's questions.

Also, a trial court has broad discretion to conduct a trial and may express itself in exercising this discretion, including making remarks during trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). Such remarks do not ordinarily support a bias or partiality challenge. *Id.* at 240; *see also Daniels v. Balcones Woods Club, Inc.*, No. 03-03-00310-CV, 2006 WL 263589, at *2 (Tex. App.—Austin Feb. 2, 2006, pet. denied) (mem. op.) ("Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion."). Instead, a reversible bias or partiality occurs only when the judge's conduct showed "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Dow Chem. Co.*, 46 S.W.3d at 241 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

When the trial resumed on March 4, during Moree's examination Browder's counsel made one hearsay objection that the court overruled and some sixteen non-responsive

objections—about nine of which were sustained, one overruled, and about five on which the court made no rulings. At one point, Browder's counsel asked Moree whether it was "reasonable to believe" that Kelly heard Moree "yelling in the house?" The court said, "Objection. That calls for speculation. She doesn't have counsel here, so I'm going to have to assert any problematic questions from the Court." Counsel started to reply, "I'm not sure—" before the court rejoined, "I'm not going to object—that was not appropriate—but just make sure that your questions don't call for speculation." Later the trial court began asking Moree a series of questions about Browder's alcohol consumption, after which Browder's counsel stated, "I don't want to allow too long of a dialogue to ensue to wherein [Moree]'s being told what topics to discuss." The court replied that it could not "make decisions about best interest of the child . . . without having sufficient information" as to the parties. Browder's counsel rejoined, "I would object to a leading question or I would object to something that assumes facts not in evidence, and I would have to object—." The court told Browder's counsel that she should object if the court "get[s] into leading questions" and to "let [the court] know if [she] had concerns about specific questions."

The following day during Browder's testimony, the trial court asked that his counsel not seek to elicit hearsay and directed Browder to not get into hearsay in answering questions, such as what Child Protective Services or police said. At one point, Browder's counsel asked Browder, "how many times [Kelly] had met Dr. Sherry prior to your visit with her?" The trial court interjected, "That question calls for speculation—. . . Excuse me, or hearsay. One or the other." Without objection, Browder's counsel rephrased the question. While the judge initially challenged Browder about his communicating directly with Hinds between the November and

March trial dates, the judge ultimately admitted Browder's recording of a conversation with Hinds from that period upon learning that Hinds was not represented by counsel.

When Moree appeared to be hedging about sharing the details of her four separate inpatient mental-health hospitalizations during the years she was living with Browder, the judge admonished Moree to "tell the truth" and "answer my questions to the best of your ability." After the judge objected that one of Browder's questions would have required Moree to speculate, the judge admonished Moree to "listen very carefully and answer only the question that's asked of you" when Browder posed further questions on the same topic (i.e., her multiple alleged car accidents when Kelly was in the car). Many of the judge's questions to witnesses that probed deeper into subjects that had been raised during testimony concerned issues that reflected poorly on Moree rather than on Browder, such as Moree's inpatient hospitalizations and Browder's recordings of phone calls, admitted into evidence by the court, that demonstrated Moree's aggressive words and conduct in the presence of Kelly.

Although the judge posed questions to Moree while she was testifying, the questions were relevant to a best-interest determination: the chronology and quality of the relationship between Kelly and Browder; which of the parties provided what sorts of caretaking and medical decisions for Kelly while they lived together; Moree's mental health, medications, and hospitalizations; instances of domestic violence between Moree and Browder, particularly Moree's role as the instigator and perpetrator; and the parties' respective use of drugs and alcohol while they lived together. Browder's counsel objected to the judge's extensive "dialogue" with Moree, rather than requiring Moree to testify in narrative form, and to the judge's questions that extended "beyond clarification." The judge responded, "I can't make decisions about best interest of the child . . . without having sufficient information. So, you know, we can recess

again and I can give her some more time to go find a lawyer or I can get this information that I need to find out suitability of these two parents and the safety of this child . . . [a]nd ultimately what's in this child's best interest."

While there were instances when the trial court helped Moree understand and fully participate in the trial, we cannot conclude that the judge "acted as an advocate" for her. For example, the trial court suggested to Moree that she "have a notepad or something where [she] can take notes so that . . . [she doesn't] forget them" while Browder was testifying on direct examination; informed Moree that she is "obligated to make legal objections"; and asked Moree whether she knew which legal objections she was allowed to make. When Moree admitted that she did not know which objections to make, the court informed her simply to let it know if she had "concerns." Thereafter, while Browder was testifying about some photographs he had taken of himself as the victim of Moree's violent behavior, Moree attempted to object—"Your Honor, . . . I have no way of proving when these were taken." The trial court asked her whether she had any "specific objection," and upon Moree replying, "no" the trial court admitted the photographs, without any "coaching" or attempt to articulate an objection for her. Shortly thereafter Moree attempted to make another objection—"The only specific objection I have . . . is that I have no way of knowing that these were actually pictures from injuries that I caused, Your Honor. I just feel like entering all of these without me -- these are not something I've had in my possession. I don't know where they came from." The court responded that Moree could "object to authenticity or something specific about what's depicted" but did not provide any further guidance or assistance to Moree, and Moree did not rephrase her objection.

Another time the judge stated to Moree that it was "very important" for her to bring in any witnesses to testify "on [Moree's] behalf" or who knew Kelly well, such as teachers,

who could "talk about what's best for [Kelly]" before the end of the trial. When viewed in context of the trial and the trial court's duty, the obvious intent of the judge's statement was to elicit evidence relevant to its best-interest determination. Moree ultimately did not call any witnesses but did bring Kelly to court to speak with the judge, per the judge's request. The judge tempered her request that Moree bring Kelly to court with the following admonishment: "You're not to tell [Kelly] what to say or not to say. You're to say nothing to [Kelly], other than the Court has requested that she come and visit with the Judge." The judge also emphasized to Moree that the child's great-grandmother, with whom Moree and Kelly lived, was not to talk to Kelly about the next day's in-chambers visit. Later, the judge reiterated her admonishment to Moree and requested the same forbearance from Browder, in the event he spoke on the phone with Kelly.

As to the trial court's sustaining of Moree's objections to Dr. Eichler's use of the phrase "parental alienation" and instead requiring the expert to use the more accurate terms "psychological abuse" and "caretaker" to refer to Browder, who is not a biological parent or stepparent to Kelly, we conclude that the ruling did not demonstrate bias or prejudice but merely reflected the undisputed relationship between Browder and Kelly. Furthermore, Browder agreed to the use of the challenged terms in examining Dr. Eichler.

As to the trial court's recessing the November trial to allow Hinds time to hire an attorney, we conclude that such action was within the court's discretion also does not demonstrate bias or prejudice, considering both Hinds's representation to the court that he did not recall being served with the petition and needed time to hire an attorney and the rebuttable presumption that the appointment of a child's parents as joint managing conservators is in the child's best interest. *See* Tex. Fam. Code § 153.131(b). As to Browder's contention that the trial court's staff emailed Hinds "ex parte" during the trial to inform Hinds about the ongoing

proceedings and the court's "concern[] about assigning any rights or responsibilities regarding [his] daughter without [his] input," the clerk's record demonstrates that the communication was not ex parte as Browder's counsel was copied on it. Furthermore, the email likely did not prejudice Browder when Hinds did not appear at the March trial dates despite the email, and Hinds was granted possession rights only (at Moree's sole discretion), which relief Browder himself requested (as more fully discussed below).

As to the trial court's refusal to admit Moree's dating ad without admitting Browder's, we conclude that the trial court could reasonably have considered that the evidence, from "many years ago," was irrelevant and more prejudicial than probative unless both parties' ads were admitted. The ruling cannot necessarily be construed as biased against Browder on this record. We note that Browder opened the door to a follow-up query from the court about his own ad when his counsel first asked Moree how the parties met, confirmed with Moree whether both parties "posted an ad," and asked her whether she could identify "what she was seeking" after refreshing her memory by looking at her ad.

We conclude that the trial court acted within its discretion to interview Kelly in chambers. *See* Tex. Fam. Code § 153.009(a) ("The court may also interview a child in chambers on the court's own motion for a purpose specified by this subsection."). Although neither party requested that a record be made or objected to the fact that no record was made, we must presume that whatever the court learned during the interview supports its best-interest determination. *See In re C.G.B.*, No. 13-17-00154-CV, 2017 WL 3910877, at *8 (Tex. App.—Corpus Christi-Edinburg Sept. 7, 2017, no pet.) (mem. op.). While Browder's counsel objected to the judge's forthcoming interview with Kelly because he believed that Moree may have "coached" Kelly in the past about what to say to judges and other professionals, the trial judge

noted that she "had been trained to . . . listen for and to know and be cognizant if there has been any coaching . . . [and will] be listening to make sure that [Kelly] has not been coached by . . . [a]nyone, whatsoever." A child's desires is one of the non-exclusive factors that a trial court may consider in its best-interest determination. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). In open court, the judge stated that she "spent approximately an hour" with Kelly "in a very informative and wonderful interview." The judge indicated that Kelly had "articulated her preferences," which would "be part of this Court's consideration," and that Kelly's "expressed desires and preferences . . . concerns, fears, and joys" are "very important" to the court's best-interest determination. On this record, although we do not have a transcript of the judge's interview with Kelly, it is reasonable to conclude that the interview was a significant factor in the trial court's best-interest determination and that the trial judge was guided by the evidence, including the interview, rather than by bias or prejudice.

After reviewing the entire record, we conclude that the trial judge's conduct does not approach the level our sister court in *L.S.* held to constitute judicial bias and partiality. *See* 2017 WL 4172584, at *16 (concluding, "under the singular facts of this case, that the trial judge's course of conduct . . . showed a deep-seated antagonism for Father that violated Father's constitutional right to a fair trial, resulting in a judgment that neither this court nor the public generally could be confident was not improper"). In *L.S.*, which was a termination-of-parental-rights case, the trial judge's bias against the father began pre-trial, when the judge set the trial date six months earlier than the dismissal date, based on the father's "poor performance of services" in a prior case, despite the "repeated opposition" of all parties, including the guardian ad litem. *Id.* at *17. While a trial court has the authority to terminate a parent's rights before the dismissal date, the trial judge did so "without making the requisite statutory findings" and by

taking judicial notice of the truth of facts admitted in a prior termination proceeding without admitting the record from that proceeding into evidence. *Id.* The record also showed that the trial judge "badgered DFPS [the Department of Family and Protective Services] into seeking termination before it was deemed necessary because the judge, who was sitting as the fact-finder, had already determined that Father was noncompliant and would never be compliant based on his knowledge of the prior proceeding and his personal 'expectations.'" *Id.* Furthermore, the trial judge appointed counsel for the father only twenty-five days before the case was called for trial, which was "insufficient for [the attorney] to discharge her statutorily mandated duties as Father's attorney ad litem." *Id.* at *18.

The trial judge's prejudice and bias against the father in *L.S.* continued into the trial stage, during which the judge relied on facts admitted in a prior termination proceeding to determine whether to grant father's motion for continuance; stated that the father's "indifference" and "flippant attitude" meant that a continuance would only "reward[] him"; "rushed the [parties'] mediation" by ordering it to occur within a week; attempted to "trivialize the judicial process" by "opin[ing] on how or even whether" the appellate court could "second guess" his decision to consider the prior termination proceeding; accused the father of "lying" and threatened to have him prosecuted for perjury; acted as an advocate in favor of termination through his questioning of the father, which occurred at length in a demeaning and accusatory manner, including asking him if he was withholding childcare items from the foster parents as "leverage"; and characterized the father's testimony on particular issues as "ridiculous" and "crap." *Id.* at *19. Post-trial, the judge stated that because the father had found a higher paying job the month before, the judge did not believe that the father was indigent and mentioned that if the father decided to "proceed" with an appeal, the judge would "revisit any findings previously

made concerning [the] father's indigency status." *Id.* The trial judge also unnecessarily delayed appointing appellate counsel for the father, after trial counsel withdrew, which resulted in father missing the deadline for filing a motion for new trial. *Id.* This "entire course of conduct" by the trial judge, which constituted "more than isolated remarks on the record or unfavorable rulings, revealed [the judge's] deep-seated antagonism against Father that had its apparent genesis in the prior and separate termination proceeding." *Id.* at *20.

In considering Browder's first issue, we neither impliedly nor expressly approve of the trial court's different actions during the trial. Rather we look at the entire record as a whole as in *L.S.* to determine whether the trial judge exhibited partiality, bias, deep-seated antagonism, favoritism, or advocacy for or against any party. We do not so find in this record. Accordingly we overrule Browder's first issue.

Denial of Browder's demand for jury trial

In his second issue, Browder contends that the trial court abused its discretion in denying his demand for a jury trial. On February 1, 2019, Browder filed a demand for jury trial and tendered the proper fee. *See* Tex. R. Civ. P. 216. The trial court denied his request in a letter ruling to the parties on February 22, 2019, stating: "The final trial of this case started on November 26, 2018 . . . and the trial was recessed until the week of March 4, 2019, which is a non-jury week. Any request for a jury trial was waived by the parties before trial began on November 26, 2018. Tex. R. Civ. Pro. 216(a)."[7]

We conclude that Browder has not preserved this issue for our review because he did not object to the trial court's denial of his request or to the trial proceeding before the

[7] The clerk's record does not contain a request by either party for a jury trial prior to the start of trial on November 26, 2018.

bench when the trial resumed on March 4, 2019, and he did not otherwise raise the issue with the trial court. *See* Tex. R. App. P. 33.1; *In re M.P.B.*, 257 S.W.3d 804, 811 (Tex. App.—Dallas 2008, no pet.), *disapproved on other grounds by In re C.J.C.*, 603 S.W.3d 804 (Tex. 2020) (concluding that father waived right to complain on appeal about alleged error of trial court in denying his perfected right to jury trial because he did not object about case going forward without jury or otherwise affirmatively indicate that he intended to stand on his right to jury trial); *Addicks v. Sickel*, No. 2-03-218-CV, 2005 WL 737419, at *3 (Tex. App.—Fort Worth Mar. 31, 2005, no pet.) (mem. op.) (holding that, although party requested jury trial in petition, he did not object to trial proceeding forward without jury or otherwise raise complaint before trial court); *see also In re P.N.T.*, 580 S.W.3d 331, 339 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) ("To preserve a complaint about the denial of a jury trial, the complaining party must object when the trial court proceeds with a bench trial."). Accordingly, we do not address the merits of Browder's second issue.

Whether the trial court improperly considered extrinsic information in rendering judgment and in sua sponte excluding hearsay evidence

In his third and final issue, Browder contends that the trial court abused its discretion by considering two forms of unadmitted, extrinsic information as a basis for judgment and excluding hearsay evidence when no party objected to it. He identifies the unadmitted extrinsic information as (1) Dr. Sherry's child custody report and (2) Hinds's unsworn statements at the November trial setting. As to Dr. Sherry's report, Browder contends that while direct-examining Dr. Sherry, he offered her report into evidence but the trial court excluded it sua sponte as hearsay. Although the trial court did not admit the report, Dr. Sherry testified extensively, and Browder had the opportunity to question her on matters she had covered in the report.

Browder complains that, although the report was excluded, the trial transcript "makes it clear that the judge asked witnesses [specifically Browder and Moree] questions based on information gleamed [sic] from Dr. Sherry's unadmitted report," and that the judgment was, therefore, "rendered based on improper evidence." However, when Browder again raised the issue of the report on the last day of trial—complaining that the trial court used information from the unadmitted report to ask questions of the witnesses—the trial court asked Browder if he still sought to admit the report, asked Moree whether she had any objection to admitting it, and requested further information about the background of the report (i.e., the exact text of the order appointing Dr. Sherry) because such information "might change" its ruling about the report's admissibility. Moree responded that she did not "have a position one way or the other" about whether the report was admitted, and Browder responded that he wanted to withdraw his offer to admit the report, both because he had proceeded to direct-examine Dr. Sherry differently than he would have had the report been admitted and in light of the trial court's refusal to disregard evidence it elicited based on its own review of the report. The trial court granted his request to withdraw the report as an exhibit.

Despite the long colloquy about the report, its admissibility, and whether the trial court could rely on the information therein in formulating questions to witnesses, Browder neither made an offer of proof of the report itself nor does he identify on appeal any specific questions or testimony that were elicited by the judge that were purportedly directly and solely spurred by the report's contents rather than from Dr. Sherry's live testimony. Accordingly, even assuming that the trial court erroneously relied on information in the unadmitted report as the basis of its questioning of witnesses, we cannot on this record discern what harm, if any, resulted thereby. *See* Tex. R. App. P. 44.1 (defining reversible error in civil cases as that which

"probably caused the rendition of an improper judgment"). We overrule Browder's third issue as it pertains to Dr. Sherry's report.

As to the second form of extrinsic information on which the trial court allegedly improperly relied, Browder contends that the "only place in the entire record" supporting the trial court's finding of fact number twenty-four[8] is the following unsworn statement by Hinds in response to a query from the bench:

> The Court: Are you aware that they are seeking termination of your parental rights here today?
>
> Hinds: Yes, ma'am. That's—I'm sorry. Yes, ma'am. That is why I showed up today because I've never had a chance to be in [Kelly's] life, and now that all this is going on and I'm aware of everything, I wanted to come down here today and just make it known that I do not want to give up my rights, and I would like to be in [Kelly's] life.

Browder argues that because Hinds had not been sworn in, he was not properly testifying, *see* Tex. R. Evid. 603, and the trial court therefore improperly considered Hinds's unsworn statements as evidence, resulting in the factually unsupported finding that Hinds "desires to see [sic] and to participate in the child's life" and the rendition of an improper judgment. *See* Tex. R. App. P. 44.1.

Browder does not explain how an improper judgment was rendered based on finding of fact number twenty-four, but to the extent that he is complaining about Hinds being appointed a possessory conservator, we note that Browder requested that very relief in his live petition. Additionally, the parties agreed in open court at the end of the trial that Hinds should be appointed a possessory conservator. When the trial court grants the very relief

[8] Finding of fact number twenty-four reads, "RESPONDENT CLARENCE DEAN HINDS, JR. desires to see [sic] and to participate in the child's life."

requested by a party, that party cannot complain on appeal about the relief the court has awarded. *See In re J.L.C.*, 194 S.W.3d 667, 673 (Tex. App.—Fort Worth 2006, no pet.); *Nesmith v. Berger*, 64 S.W.3d 110, 119 (Tex. App.—Austin 2001, pet. denied). We overrule Browder's third issue as it pertains to the trial court's consideration of Hinds's unsworn testimony.

Browder lastly complains about the trial court's sua sponte exclusion based on hearsay of several items of his evidence, including Dr. Sherry's report and portions of Browder's testimony when the trial court "interrupted" him and asked him not to "tell [the court] what the child said." He contends that "every component of the final trial of the merits was tainted by the trial judge's refusal to acknowledge [the principle] that unobjected to hearsay is admissible and constitutes admissible evidence" with probative value. *See* Tex. R. Evid. 802 ("Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay."). Browder appears to be contending that, had the trial court not sua sponte excluded the hearsay, the evidence would have been admitted without objection, and the trial court could have properly considered it in its determination of which conservatorship provisions were in Kelly's best interest. However, as noted above with respect to Dr. Sherry's report, Browder did not make any offers of proof as to any of the alleged excluded hearsay. He has not, therefore, preserved error as to the excluded evidence. *See* Tex. R. Evid. 103(a)(2); Tex. R. App. P. 33.1; *In re L.L.J.*, No. 02-14-00407-CV, 2015 WL 5634111, at *1 (Tex. App.—Fort Worth Sept. 24, 2015, no pet.) (mem. op.) ("The primary purpose of an offer of proof is to enable the appellate court to determine whether the exclusion was erroneous and harmful."). We therefore do not address the remainder of Browder's third issue.

CONCLUSION

We affirm the trial court's final SAPCR order.

_____

Thomas J. Baker, Justice

Before Justices Goodwin, Baker, and Kelly
Concurring Opinion by Justice Goodwin

Affirmed

Filed: June 2, 2021