NUMBER 13-15-00516-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

IN THE INTEREST OF M.R.H., A CHILD

On appeal from the 139th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Garza and Longoria
Memorandum Opinion by Justice Garza

This is an appeal from a modification order in a suit affecting the parent-child relationship (SAPCR). Appellant M.H. (Father), M.R.H.'s father, representing himself pro se, raises two issues: (1) the trial court erred in excluding evidence; and (2) the evidence supporting the trial court's order is factually insufficient to support the judgment.[1] We

[1] We identify the child with initials and the parents of the child as mother and father to protect the identity of the parties. *See* TEX. FAM. CODE ANN. 109.002(d) (West, Westlaw through 2015 R.S.) (providing that appellate court may identify parties in opinion by fictitious names or their initials).

affirm.

I. BACKGROUND

M.R.H.'s parents, Father and M.R. (Mother), were divorced in 2010. Mother and Father were appointed joint managing conservators, with Mother named as the primary conservator with no geographic restrictions. In July 2015, Father filed an emergency motion to modify the parent-child relationship and for a temporary injunction, in which he requested, among other relief: (1) to be appointed sole managing conservator of M.R.H.; (2) that Mother be ordered to pay child support; and (3) that Mother be enjoined from removing M.R.H. from the school where she was enrolled. Father attached an affidavit in which he alleged that Mother intended to move to New Jersey with M.R.H.

Mother filed a response and counter-petition to modify the parent-child relationship, in which she requested, among other things: (1) that she be appointed sole managing conservator of M.R.H.; (2) that Father be denied access to M.R.H., or alternatively, that he be granted supervised access only; (3) that a social study be completed; and (4) that the court order M.R.H. into Mother's possession. Mother attached her own affidavit, in which she stated: (1) for the past two years, she and M.R.H. lived in Mansfield, Texas, but recently moved to New Jersey; (2) during the time they lived in Mansfield, Father only arranged to visit M.R.H. two or three times a year; (3) when M.R.H. visits Father, she is exposed to Father's brother, who is a registered sex offender[2]; (4) Father has a criminal history, including a history of family violence; (5) M.R.H. begged her not to tell Father they were moving to New Jersey; (6) that at the end of M.R.H.'s current summer 2015 visit with Father, Father refused to return M.R.H. to Mother; and (7) she

[2] The 2010 order in the SAPCR provided for no contact with Father's brother.

has been unable to talk to M.R.H. and does not know where she is living.

At a brief hearing on October 1, 2015, the trial court heard argument from both parties.[3] No evidence was offered or admitted. The record reflects that the trial court considered a social study prepared by a social study investigator. The investigator was present at the hearing. At one point, the trial court spoke privately to M.R.H. in chambers.[4] *See* TEX. FAM. CODE ANN. § 153.009(a), (b) (West, Westlaw through 2015 R.S.) (providing that trial court may interview in chambers a child under twelve years of age to determine the child's wishes as to conservatorship, the person who shall have the right to determine the child's primary residence, possession, access, or any other issue in a SAPCR). Upon returning to the bench, the trial court stated that "the best interest of the child is that they go to New Jersey." The same day, the trial court signed an order modifying the parent-child relationship by granting Mother's request to relocate M.R.H. to New Jersey and by appointing Mother sole managing conservator of M.R.H. and Father as possessory conservator.[5] This appeal followed.

II. STANDARD OF REVIEW AND APPLICABLE LAW

> We review the trial court's decision to modify conservatorship under an abuse of discretion standard. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982). "A trial court abuses its discretion only when it has acted in an unreasonable or arbitrary manner, or when it acts without reference to any guiding principle." *In re Marriage of Jeffries*, 144 S.W.3d 636, 638 (Tex. App.—Texarkana 2004, no pet.) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)). Under this standard, legal and factual sufficiency are not independent grounds for asserting error, but are relevant factors in determining whether the trial court abused its discretion. *Niskar v. Niskar*, 136 S.W.3d 749, 753 (Tex. App.—Dallas 2004, no pet.);

[3] The reporter's record of the hearing is less than fifteen pages long. Both parties were represented by counsel at the hearing.

[4] M.R.H. was nine years old at the time of the hearing.

[5] The order provided for possession and access based on a standard possession order.

> *In re Davis*, 30 S.W.3d 609, 614 (Tex. App.—Texarkana 2000, no pet.). In determining whether the trial court abused its discretion, we consider whether the trial court had sufficient evidence upon which to exercise its discretion and, if so, whether it erred in the exercise of that discretion. *In re W.C.B.*, 337 S.W.3d 510, 513 (Tex. App.—Dallas 2011, no pet.). We consider only the evidence most favorable to the trial court's ruling and will uphold its judgment on any legal theory supported by the evidence. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam); *Niskar*, 136 S.W.3d at 753–54. Where, as here, no findings of fact and conclusions of law are filed, it is "implied that the trial court made all the findings necessary to support its judgment." *Worford*, 801 S.W.2d at 109.
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> We are mindful that "the trial judge is best able to observe and assess the witnesses' demeanor and credibility, and to sense the 'forces, powers, and influences' that may not be apparent from merely reading the record on appeal." *In re A.L.E.*, 279 S.W.3d 424, 427 (Tex. App.—Houston [14th Dist.] 2009, no pet.). We, therefore, defer to the trial court's judgment in matters involving factual resolutions and any credibility determinations that may have affected those resolutions. *George v. Jeppeson*, 238 S.W.3d 463, 468 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

In re P.M.G., 405 S.W.3d 406, 410 (Tex. App.—Texarkana 2013, no pet.).

III. DISCUSSION

By his first issue, appellant complains that the trial court erred in excluding critical evidence.[6] However, at the hearing, appellant did not request that any evidence be admitted. To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion that states the specific ground for the desired ruling, if they are not apparent from the context of the request, objection, or motion. TEX. R. APP. P. 33.1(a). If a party fails to do this, error is not preserved, and the complaint is waived. *Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) (per curiam). Accordingly, we overrule appellant's first issue.

By his second issue, appellant complains that "the trial court's judgment is not

[6] We note that appellant's brief contains not a single citation to the record or to any authority. Nonetheless, we exercise our discretion to address his issues. *See* TEX. R. APP. P. 38.1(h), (i).

supported by factually sufficient evidence." Appellant's primary complaint appears to be that the trial court's ruling that it was in M.R.H.'s best interest to move to New Jersey with Mother was an abuse of discretion. Appellant asserts that since September 2015, he has only seen M.R.H. on one occasion, in December 2015. Appellant requests that this Court order Mother to "reinstate [M.R.H.] in Cameron County."

Mother's counter-petition to modify the parent-child relationship requested modification by requesting that she be appointed sole managing conservator. The counter-petition asserted that the modification was in the best interest of M.R.H. and that the circumstances of the parties had materially and substantially changed. The counter-petition and Mother's affidavit stated that Father had been convicted of an offense involving family violence. The affidavit further stated that Father had refused to return M.R.H. and that M.R.H. was exposed to a registered sex offender on extended visits with Father.

The family code provides that the court may modify a prior order (1) if doing so would be in the child's best interest and (2) if the child's or parties' circumstances have "materially and substantially changed" since the order was rendered. TEX. FAM. CODE ANN. § 156.101(a)(1) (West, Westlaw through 2015 R.S.). The party seeking modification has the burden to establish these elements by a preponderance of the evidence. *See Coburn v. Moreland*, 433 S.W.3d 809, 827 (Tex. App.—Austin 2014, no pet.); *see also In re A.M.B.V.*, No. 13-13-00081-CV, 2015 WL 127891, at *4 (Tex. App.—Corpus Christi Jan. 8, 2015, no pet.) (mem. op.).

As to M.R.H.'s best interest, there is no bright-line rule for determining what is in a child's best interest; each case must be determined on its unique set of facts. *Moreland*,

433 S.W.3d at 827 (citing *Lenz v. Lenz*, 79 S.W.3d 10, 19 (Tex. 2002)). Here, the trial court found that it was in M.R.H's best interest to move to New Jersey with Mother immediately after conferring with M.R.H. in chambers. Although the record is silent as to what transpired in the trial court's chambers, we consider only the evidence most favorable to the trial court's ruling and will uphold its judgment on any legal theory supported by the evidence. *See In re P.M.G.*, 405 S.W.3d at 410. The trial court had before it evidence that: (1) Mother and Father were unable to co-parent amicably and were unable to communicate effectively, with Mother accusing Father of holding M.R.H. hostage and refusing to accept Mother's calls; (2) while in Father's possession, M.R.H. may have been exposed to a registered sex offender, in violation of the court's order; and (3) Father failed to exercise all of his rights to visitation when M.R.H. lived in Texas. On this record and under the highly deferential standard of review applied in modification cases, we cannot conclude that the trial court abused its discretion in finding that it was in M.R.H.'s best interest to move to New Jersey with Mother. *See Moreland*, 433 S.W.3d at 828.

"In deciding whether a material and substantial change of circumstances has occurred, a trial court is not confined to rigid or definite guidelines." *In re H.D.C.*, 474 S.W.3d 758, 766 (Tex. App.—Houston [14th Dist.] 2014, no pet.). As the appellant, it was Father's burden to see that a sufficient record was presented to show error requiring reversal. *See Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 151 (Tex. 2015).

Mother's affidavit stated that, as of August 4, 2015, the date the affidavit was signed, Father had not returned M.R.H. to Mother, had refused to tell Mother where M.R.H. was living, and had refused to accept Mother's phone calls. The trial court could

have found that a material and substantial change in the parties' ability to effectively co-parent had occurred since the date of the divorce decree. *See Moreland*, 433 S.W.3d at 828. Mother's affidavit stated that M.R.H was "obviously scared" of Father's reaction to Mother's and M.R.H.'s move to New Jersey. Moreover, the trial court could have impliedly found a material and substantial change in circumstances since the entry of the divorce decree based on information obtained from its in-chambers visit with M.R.H. regarding M.R.H.'s relationship with Father.[7]

Based on the record as a whole, considering only the evidence most favorable to the trial court's ruling, *see id.*, we conclude that the trial court did not abuse its discretion in impliedly finding a material and substantial change in circumstances since the entry of the divorce decree. *See id.* at 413. The trial court likewise did not abuse its discretion in finding that the modification ordered was in the best interest of the child. *See id.* We overrule appellant's second issue.

In her appellate brief, Mother attempts to raise several issues. However, Mother did not file a cross-notice of appeal raising any issues in this Court. Any party seeking to alter a trial court's judgment or other appealable order must file a notice of appeal. TEX. R. APP. P. 25.1(c). Unless a party seeking to alter a trial court's judgment files a notice of appeal of its own, the appellate court is not permitted to grant more favorable relief than the trial court except for just cause. *Id*.; *see State Farm Mut. Auto. Ins. Co. v. Bowen*, 406 S.W.3d 182, 185 (Tex. App.—Eastland 2013, no pet.) (citing *Brooks v. Northglen*

[7] At the hearing, when the trial court conducted the in-chambers interview with M.R.H., Father did not object, request to be present, or request that the interview be recorded. He therefore waived any right to complain of the interview. *See Voros v. Turnage*, 856 S.W.2d 759. 763 (Tex. App.—Houston [1st Dist.] 1993, writ denied). An appellant challenging the sufficiency of the evidence to support the trial court's judgment cannot meet that burden without presenting a sufficient record on appeal because it is presumed that the omitted portions of the record support the trial court's judgment. *Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991).

Ass'n, 141 S.W.3d 158, 171 (Tex. 2004)). We overrule Mother's issues.

IV. CONCLUSION

We affirm the trial court's judgment.

DORI CONTRERAS GARZA
Justice

Delivered and filed the
21st day of December, 2016.