NO. 12-10-00386-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN THE INTEREST	***§***	***APPEAL FROM THE 321ST***
OF K.L.D.,	***§***	***JUDICIAL DISTRICT COURT***
A CHILD	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Q.C. appeals from the trial court's modification order in a suit affecting the parent-child relationship. In seven issues, she contends the trial court's modifications are an abuse of discretion, the trial court erred in ordering her to pay attorney's fees, and the evidence does not support the amount of attorney's fees awarded. We modify in part and affirm the trial court's order as modified.

BACKGROUND

K.L.D. was born October 14, 2006. On January 5, 2007, the court named his parents, Q.C. and C.D., joint managing conservators and ordered standard possession. Q.C. was given the right to determine the primary residence of the child within Smith County and contiguous counties. C.D. was ordered to pay child support. Just over three years later, Q.C. filed a motion to modify asserting that the existing order relating to possession and access had become unworkable. She requested the court lift the geographic restriction to allow her to move to Dallas County, and to increase the amount of monthly child support payments. C.D. filed a counterpetition requesting the court modify certain terms and conditions for access to or possession of the child, appoint him as the person who has the right to designate the primary residence of the child, and order Q.C. to pay child support and provide health insurance for the child.

After a hearing, the court ordered that Q.C. and C.D. shall continue as joint managing conservators with the primary residence of the child restricted to Smith County, Texas, and specifically within the attendance zone of Jack Elementary School. Further, the court ordered that possession of and access to the child shall be by the "2-2-5-5" or "5-2 Wrap" possession schedule[1] and that neither parent shall pay child support. The court order provides that communication between the parents shall be through written notes. The order authorizes C.D. to arrange for and pay for day care and orders Q.C. to provide health care coverage for the child. The court also ordered the parents to mediate controversies before setting any hearing or initiating discovery in a suit for modification of the terms of the order, except in an emergency. Additionally, the court ordered Q.C. to pay $5,000.00 for attorney's fees incurred by C.D.

STANDARD OF REVIEW

The court may modify an order that provides for the appointment of a conservator of a child, that provides the terms and conditions of conservatorship, or that provides for the possession of or access to a child if modification would be in the best interest of the child and the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed. TEX. FAM. CODE ANN. § 156.101 (West Supp. 2011). The trial court has wide latitude in determining the best interest of a child, and the decision of the trial court will be reversed only when it appears from the record as a whole that the court has abused its discretion. ***In re Marriage of Stein***, 153 S.W.3d 485, 488 (Tex. App.–Amarillo 2004, no pet.). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner, or when it acts without reference to any guiding rules or principles. ***Beaumont Bank, N.A. v. Buller***, 806 S.W.2d 223, 226 (Tex. 1991).

Under this standard of review, legal and factual sufficiency of the evidence, although not independent grounds for asserting error, are relevant factors in assessing whether the trial court abused its discretion. ***Seidel v. Seidel***, 10 S.W.3d 365, 368 (Tex. App.–Dallas 1999, no pet.). In considering a legal sufficiency point, we consider the evidence in the light most favorable to the verdict and indulge every reasonable inference that would support it. ***City of Keller v. Wilson***, 168 S.W.3d 802, 822 (Tex. 2005). There is no abuse of discretion if some evidence of a

[1] In this possession schedule, neither parent goes more than five days without seeing the child except spring break, seven-day extended summer possession, and holidays.

substantive and probative character supports the decision. ***Holley v. Holley***, 864 S.W.2d 703, 706 (Tex. App.–Houston [1st Dist.] 1993, writ denied). A factual sufficiency review requires examination of all of the evidence in determining whether the finding in question is so against the great weight and preponderance of the evidence as to be manifestly unjust. ***In re King's Estate***, 244 S.W.2d 660, 661 (Tex. 1951). If there is sufficient competent evidence of probative force to support the finding, it must be sustained. ***In re J.A.H.***, 311 S.W.3d 536, 541 (Tex. App.–El Paso 2009, no pet.). It is for the trier of fact to draw inferences from the evidence, resolve conflicts in the evidence, and judge the credibility of witnesses. ***City of Keller***, 168 S.W.3d at 819-21; ***Benoit v. Wilson***, 239 S.W.2d 792, 796 (Tex. 1951). Furthermore, the trial court faces the parties and the witnesses, observes their demeanor and personality, and feels the forces, powers, and the influences that cannot be discerned by merely reading the record. ***In re Marriage of Bertram***, 981 S.W.2d 820, 826 (Tex. App.–Texarkana 1998, no pet.). The trial judge is, therefore, in a better position to analyze the facts, weigh the virtues of the parties, and determine what will be in the best interest of a child. ***Id.***

The best interest of the child is always the primary consideration in determining issues of conservatorship, possession of and access to the child, and child support. TEX. FAM. CODE ANN. § 153.002 (West 2008); ***In re J.A.H.***, 311 S.W.3d at 541. In determining the best interest of the child, we consider the public policies outlined in the family code. ***Lenz v. Lenz***, 79 S.W.3d 10, 14 (Tex. 2002). Section 153.001 states that the public policy of Texas is to (1) assure that children will have frequent and continuing contact with parents who have shown an ability to act in the best interest of the child, (2) provide a safe, stable, and nonviolent environment for the child, and (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage. TEX. FAM. CODE ANN. § 153.001(a)(1)-(3) (West 2008).

A wide array of factors can be relevant to the determination of a child's best interest, including (1) the child's desires, (2) the child's current and future physical and emotional needs, (3) any physical or emotional danger to the child in the present or future, (4) the parental abilities of the individuals involved, (5) the programs available to those individuals to promote the child's best interest, (6) the plans for the child by these individuals, (7) the stability of the home, (8) acts or omissions by a parent tending to show that the existing parent-child relationship is not a proper one, and (9) any excuse for the acts or omissions of the parent. ***Holley v. Adams***, 544

S.W.2d 367, 371-72 (Tex. 1976). Additional factors relevant to whether a relocation is in the child's best interest include (1) reasons for and against the move, (2) education, health, and leisure opportunities afforded by the move, (3) accommodation of the child's special needs or talents, (4) effect of extended family relationships, (5) effect on visitation and communication with the other parent, (6) the other parent's ability to relocate, and (7) the child's age. ***Lenz***, 79 S.W.3d at 15-16.

CUSTODY, SUPPORT, AND THE CHILD'S RESIDENCE

In her third issue, Q.C. contends the trial court abused its discretion in taking the primary custody of the child away from her, in taking the right to receive child support away from her, and in ordering a 2/2/5/5 equal custody plan. She argues that the record does not support the court's finding that this is a highly litigious case

In her first issue, Q.C. contends that the trial court abused its discretion in taking the exclusive right to determine the child's residence away from her and giving it to C.D. In her second issue, Q.C. asserts the trial court abused its discretion in refusing to loosen the restriction on the child's residence and in further tightening it to a single county and school.

The Record

In the original order, Q.C. and C.D. were named joint managing conservators, and the trial court ordered that Q.C. had the exclusive right to designate the primary residence of the child within Smith County and contiguous counties. In the modification order, the court ordered the parties to "continue as Joint Managing Conservators with the child's residence restricted to Smith County, Texas and Jack Elementary School, Tyler, Texas." Additionally, the order includes a separate paragraph explaining that the court is ordering the residence restriction because of Texas public policy. That policy is to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child, to provide a safe, stable, and nonviolent environment for the child, and to encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage. The court ordered that possession and access of the child shall be by the "2-2-5-5" or "5-2 Wrap Possession Schedule." The court ordered that because the parties share the child equally, no child support is ordered.

In its findings of fact, the court found that it is in the best interest of the child that C.D. and Q.C. be continued as joint managing conservators. The court further found that K.L.D. has two parents who are involved with and interested in him, and because of this involvement and interest, it is in the best interest of the child that the residence of the child be restricted to Smith County, Texas, and Jack Elementary School. The court also found that since this is a highly litigious case, it is in the child's best interest that the parties' possession and access shall be based upon a 2/2/5/5 possession schedule, and the exchange shall take place at school or daycare.

Both parents and their families reside in Smith County. Q.C. was twenty-one years old at the time of trial and lived with her mother. She testified that visitation was unworkable. C.D.'s mother, Wanda, who frequently picked up K.L.D. for visitation, was argumentative, had a bad attitude, and was very disrespectful of Q.C. Also, Wanda was late and attempted to change the visitation hours. Q.C. said that she is unable to deal with Wanda. Q.C. testified that C.D. speaks to her aggressively. At times, C.D. smoked marijuana in the presence of the child. Q.C. testified that C.D. makes her adhere to the visitation schedule and does not volunteer for "extracurriculars." One summer, he prevented her from taking K.L.D. on the weekend of her choice. At some point, she and C.D. stopped communicating and things got "verbally aggressive." They had to exchange at the police station because exchanging at Q.C.'s mother's house became unworkable. Q.C. testified that, although she has been going to school at Tyler Junior College, she wanted to move to Dallas and attend college there. She explained that K.L.D. would attend a Head Start program there that is more advanced than the program in Tyler and offers more activities and field trips. She stated that she had already been accepted to El Centro College in Dallas and planned to study cardiovascular technology. She said she would be able to work at Wal-Mart in Dallas and that, if she goes to school in Dallas, she would have more money to take care of her son and be a better mother. Q.C. also explained that she recently had another baby, and she plans to marry the baby's father at the end of the year. The baby's father currently resides in Dallas and is going to school there. Q.C. testified that it would be in K.L.D.'s best interest to live with her, his new stepfather, and his baby sister.

Q.C. said she is willing to give C.D. an extra two hours on weekends to make up for the loss of his Thursday night visitation, and she had no problem with C.D. having K.L.D. more in the summer. She agreed to work with C.D. on extended visits. She acknowledged that C.D. did not want her to move away. She said she was frustrated because he had been able to move to

Arizona when he wanted to but she cannot move. Q.C. did not think it would be a problem for C.D. to remain in K.L.D.'s life if she moved to Dallas, but she did not think she could do it if she moved and K.L.D. stayed in Tyler. She did not know what elementary school K.L.D. would attend in Tyler. She said he does not qualify to be in Head Start in Tyler but he does qualify for the program in Dallas. Q.C. explained that, in Dallas, she would live with her fiancé and her two children. Her fiancé's mother would babysit the baby and K.L.D. would go to school. She said she had wanted to move in 2007 and had discussed it with the trial court at that time. She also had raised the issue in mediation in 2009. According to Q.C., C.D. has not offered any compromise to the relocation problem.

Regarding Q.C.'s education, the following colloquy occurred between Q.C. and the court:

> The Court: Ma'am, you told me you wanted to be a cardiovascular tech. What does that person do?
> Q.C.: They — the heart, the veins, the — the veins in the left leg and the brain.
> The Court: Okay. What do they do to them?
> Q.C.: They're like — they look at them through a machine.
> The Court: They look at them through a machine?
> Q.C.: Yes. Like cardio patients kind of, sort of.
> The Court: I'm sorry?
> Q.C.: Like a car — like a cardio patient.
> The Court: Okay.
> Q.C.: They look at your heart.
> The Court: What kind of machine do they look at?
> Q.C.: They look at it — I believe it's like a sonogram machine kind of, sort of.
> The Court: Okay. You want to be a sonogram — you want to take sonograms of somebody's veins?
> Q.C.: Veins, brains, and the heart.
> . . . .
> The Court: Okay. And are you aware they have that program at T.J.C.?
> Q.C.: No. Not the cardiovascular.
> The Court: Okay. Which is an advanced certification from sonogram, right?
> Q.C.: Yes.
> The Court: You have to first have your basic sonogram?
> Q.C.: No. No. You just have to have your prerequisites of all your biology. They don't have the cardio — they don't offer the cardio. They offer the sonogram.

Q.C. went on to explain that at El Centro, you do not have to be certified in "regular sonogram" before learning the "cardio part." She said it is "all one class."

C.D. testified that he wants both parents to raise K.L.D., but he wants to be primary conservator. He said that he and Q.C. have never discussed plans for K.L.D. He testified that Q.C. gives him "a lot of problems" about seeing K.L.D. and would not accept any of his

compromises. He explained that, for a time, he saw his son whenever he wanted to, which was almost every day, until Q.C. learned he had a girlfriend. He kept K.L.D. for days or weeks at a time and took care of him. But since June of 2009, he visits according to the court order and no more. C.D. said that Q.C. is jealous of his relationship with K.L.D., gives him a lot of problems about seeing his son, and will not tell him what is going on with his son. He explained that he tried to add K.L.D. to his insurance, but Q.C. would not give him K.L.D.'s social security number. C.D. admitted to smoking marijuana but denied smoking it in front of K.L.D. He also denied any knowledge of disagreements between his mother and Q.C. or her family, or between his brother and Q.C.

Although C.D. currently lives in Tyler with his mother, stepfather, and brother, he plans to get an apartment in Jack Elementary School's district. He would enroll K.L.D. in New Life Learning Center, a daycare he has attended in the past. C.D. plans to marry in a few months. He plans to finish his education at Tyler Junior College or the University of Texas at Tyler.

He testified that, if K.L.D. lived in Dallas, he would not be able to see his son frequently and he would not be able to participate in father/son activities. He agreed that going to Head Start would be in K.L.D.'s best interest, but he is not sure K.L.D. cannot get the same education in Tyler as in Dallas. He objected to losing the time he spends with K.L.D. on Thursday nights. He also explained that driving to Dallas might interfere with his job. He would be willing to give forty-eight hours notice to see K.L.D. at other times. However, he testified that he would like to have shared custody, with each parent having K.L.D. an equal amount of time. He suggested that K.L.D. spend two weeks at a time with each parent. He explained that a child should have a father around him to help him and teach him. He is trying to break the cycle of the absentee father. Additionally, K.L.D. is close to his cousin and, if he moved to Dallas, he would miss out on being near his uncles, grandparents, and two half-siblings. He explained that he has had trouble getting possession and had to call the police three or four times. He said it would not be easier if K.L.D. lives away. In Tyler, he can find out about activities from K.L.D.'s school, but in Dallas he would have trouble getting to his activities. He wants to go to all of his son's activities, and he believes it is best for K.L.D. if C.D. and other family members are near so they are able to attend school activities.

Possession and Support

The evidence shows that both parents are young and have incomplete educations. Both are trying to complete their educations to create a better life for themselves and K.L.D. Both have family members in Tyler who are willing and able to help them raise K.L.D. Both have other young children and plans to marry. Both had a plan for K.L.D. but in different counties. They are not able to communicate with one another in a mature, polite manner. Q.C. has a poor relationship with C.D.'s mother, an individual who plays a prominent role in K.L.D.'s life. The previous court-ordered visitation had become unworkable as to schedule and communication. The parents had stopped communicating and resorted to meeting at the police station when K.L.D. travelled between parents.

The trial court specifically found that, since this is a highly litigious case, it is in the child's best interest for the parents to have equal possession and access. The record shows that C.D. filed his original petition when K.L.D. was two and one-half weeks old. The suit was pending until the original order was signed when he was almost four months old. Two years later, the parties went to mediation. The motion to modify was filed on February 16, 2010, when K.L.D. was three years, four months old, and the modification order was signed the day before his fourth birthday. Considering that, at the time of trial, the parents have been in litigation for much of the boy's life, the trial court did not abuse its discretion in finding that this is a highly litigious case.

Both Q.C. and C.D. want to be active participants in raising K.L.D. They seem equally able to provide a home for him. Where both parents are stable, meet the child's emotional and physical needs, and are not a danger to the child, there seems no compelling reason for a trial court to order one parent to be the possessory conservator over the other. The trial court was in a better position to determine the best interest of the child because it observed the witnesses' demeanor and could evaluate the claims made by each parent. *See* ***In re Marriage of Bertram***, 981 S.W.2d at 826. The trial court's order to continue the parents as joint managing conservators with equal possession promotes the public policy of Texas as stated in the family code. *See* TEX. FAM. CODE ANN. § 153.001(a)(1)-(3). Since the parents have joint, equal possession, it is fair that neither party is required to pay child support to the other. We conclude that the trial court did not abuse its discretion in determining that it is in the child's best interest to continue the parents as joint managing conservators, or in ordering that each parent have equal

possession of K.L.D. and neither parent should pay child support. *See* ***In re Marriage of Stein***, 153 S.W.3d at 488. We overrule Q.C.'s third issue.

The Child's Residence

Q.C. wanted to move to Dallas to continue her education. While that is a laudable goal, and might be in Q.C.'s best interest, it cannot take precedence over what is in K.L.D.'s best interest. The move would make it more difficult for K.L.D. to see his father and his extended family on both sides. C.D. had no intention of moving to Dallas, and he would not be able to see K.L.D. frequently or attend many of K.L.D.'s activities because it would conflict with his job. While Q.C. testified that K.L.D. would have better educational opportunities in Dallas, she provided no details or documentation. The court was familiar with the educational opportunities available to K.L.D. in Tyler. The court could also note that, in Dallas, Q.C. would not have the support of her family, which she has apparently relied on heavily. The evidence is sketchy as to the Dallas living arrangements. Q.C. said she would live in an apartment with her fiancé and two children. There is nothing in the record about the safety of the area or quality of life.

Q.C. did not show that her well-being will be negatively affected by having to remain in Tyler. Q.C. testified that she wants to go to school to become a "cardiovascular tech." She was not able to clearly articulate the educational requirements for becoming a cardiovascular tech or the job description of a cardiovascular tech. The trial court was entitled to consider that Q.C. did not have a strong grasp on

Dallas. A move to Dallas by Q.C. and K.L.D. would not further the legislative goals set out in the family code of assuring frequent and continuing contact with parents or encourage parents to share in the rights and duties of raising their child. *See* TEX. FAM. CODE ANN. § 153.001(a)(1)-(3). Allowing Q.C. to retain the right to designate the child's residence would result in her moving him to Dallas, which the trial court could have determined was not in K.L.D.'s best interest. Considering all of the circumstances, including the uncertainties in Q.C.'s plan, and deferring to the trial judge's resolution of conflicts and determination of credibility, we conclude that the trial court did not abuse its discretion in not giving Q.C. the right to designate the residence of the child.

Q.C. further complains that the trial court erred in giving that right to C.D. However, the trial court did not give that right to C.D. The court determined that the child's residence would

remain in Smith County, in Jack Elementary School's district. The family code gives the trial court the authority to establish a geographic area within which the conservator shall maintain the child's primary residence. TEX. FAM. CODE ANN. § 153.134(b)(1)(A) (West 2008). C.D. testified that some of his family members attend Jack Elementary. He described it as a "really good school" that has good teachers, provides a safe and controlled environment, and has an exemplary rating. Based on the evidence, we cannot say the trial court abused its discretion in determining that it is in K.L.D.'s best interest to reside within the geographical boundaries of Jack Elementary School's district. *See* ***Morgan v. Morgan***, 254 S.W.3d 485, 490 (Tex. App.–Beaumont 2008, no pet.). We overrule Q.C.'s first and second issues.

COMMUNICATION BETWEEN THE PARTIES

In her fourth issue, Q.C. asserts that the trial court abused its discretion by enjoining her and C.D. from communicating with one another. She argues that, in order to share in the rights and duties of raising a child, parents need to be able to talk about the issues that arise when raising a child. Further, she contends the restriction constitutes an unconstitutional prior restraint on free speech. She argues that the restriction interferes with her ability to exercise her rights.

The court found that it is in the child's best interest "that the parties do not see each other again, and they are not to text or communicate in any shape, form or fashion." Additionally, the court found that it is in the best interest of the child "that the parents communicate only through a notebook located in the child's backpack." The court ordered that "the parties shall not communicate by any means, including texting, phone calls, etc." Further, the court ordered the following:

> 7. Communication between the parties shall occur through the parties' written notes in a notebook regarding the status of the child only. The parties shall include any important information about the child and place the notebook in the child's backpack that the Respondent shall purchase for the child. The parties shall ensure that the backpack is with the child at all exchange periods.
>
> . . . .
>
> 11. Petitioner and Respondent shall not communicate with each other if the child has to go to the doctor or the hospital while the child is in his/her possession. Petitioner and Respondent shall request that the medical staff or doctor contact the other parent of the medical emergency. Parents shall not communicate with each other in the emergency room.

Q.C. testified that, at first, she and C.D. were able to talk on a regular basis and come to agreements. But then they stopped being able to agree. She explained that C.D. speaks to her "aggressively" and calls her names, and at some point they stopped communicating. She said that she filed for a "personal injunction" against C.D. and his mother because the visitation was unworkable. Eventually, they had to start meeting at the police station. C.D. testified that Q.C. gives him a lot of problems about seeing K.L.D. because she is jealous of the relationship he has with his son. He stated that Q.C. does not tell him what is going on with his son and they have never discussed plans for the child. On three or four occasions, he had so much trouble attempting to see his son that he had to call the police.

The record shows that the parties are unable to communicate in a civil manner or work out problems with visitation. The court devised a plan by which they could communicate in writing, thereby avoiding opportunities for conflict. The court did not forbid all communication, and it provided special instructions applicable to situations where the health of the child is implicated. We conclude the trial court did not abuse its discretion in requiring the parties to communicate only in writing. *See* ***In re Marriage of Stein***, 153 S.W.3d at 488.

Q.C. also contends the order violates her right to free speech. As a prerequisite to presenting a complaint for review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion. TEX. R. APP. P. 33.1(a)(1). As a general rule, a constitutional claim must have been asserted in the trial court in order to be raised on appeal. ***Dreyer v. Greene***, 871 S.W.2d 697, 698 (Tex. 1993). While Q.C. included a complaint in her motion for new trial that the trial court erred by enjoining the parties from communicating, she did not complain that the order was unconstitutional. Therefore, Q.C. has waived her complaint that the trial court's order for the parties to refrain from communicating with each other violates her right to free speech. ***Id***. We overrule Q.C.'s fourth issue.

MEDIATION

In her fifth issue, Q.C. contends the trial court erred in ordering them to attend mediation before filing any pleading or motion in court. She argues that the requirement is contrary to the family code, which authorizes only a recommendation that the parties mediate first.

The court found that it is in the child's best interest that the parties first go to mediation before filing any pleadings unless there is an emergency. The court's order provides as follows:

> 15. **Mediation** - IT IS ORDERED that before setting any hearing or initiating discovery in a suit for modification of the terms and conditions of conservatorship, possession, or support of the child, except in an emergency, the parties shall mediate, with Mr. Will Shelton serving as the mediator, the controversy in good faith. This requirement does not apply to actions brought to enforce this order or to enforce any subsequent modifications of this order. IT IS ORDERED that the party wishing to modify the terms and conditions of conservatorship, possession, or support of the child shall pay the mediator's fees for mediation and notify the other party by written notice of a desire to mediate the controversy by certified mail return receipt requested and by regular mail.

The family code provides that "[o]n the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation." TEX. FAM. CODE ANN. § 153.0071(a) (West 2008). Additionally, Section 153.134 of the family code provides that if feasible, the court shall recommend that the parties use an alternative dispute resolution method before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation, except in an emergency. TEX. FAM. CODE ANN. § 153.134(b)(5) (West 2008). However, a trial judge has no authority to order mediation as a precondition to file in the future a motion to modify conservatorship issues pertaining to a minor child. ***Id***.; ***Dennis v. Smith***, 962 S.W.2d 67, 74 (Tex. App.–Houston [1st Dist.] 1997, pet. denied). Here, the trial court went beyond merely recommending mediation before litigating future modifications. The trial court abused its discretion by ordering the parties to mediate before setting any hearing or discovery in a suit for modification of the terms and conditions of conservatorship, possession, or support of K.L.D. *See* ***Dennis***, 962 S.W.2d at 74. We sustain Q.C.'s fifth issue.

ATTORNEY'S FEES

In her sixth issue, Q.C. asserts that the trial court abused its discretion in ordering her to pay C.D.'s attorney's fees. She argues that she did not cause C.D. to retain an attorney to protect his contact with K.L.D.

It is within the trial court's discretion to award reasonable attorney's fees to the prevailing party in a suit affecting the parent child relationship. TEX. FAM. CODE ANN. § 106.002 (West 2008); ***Lenz***, 79 S.W.3d at 21; ***In re A.M.W.***, 313 S.W.3d 887, 892 (Tex. App.–Dallas 2010, no pet.). Q.C.'s requests to move to Dallas and increase child support were denied, making C.D. the prevailing party. We overrule Q.C.'s sixth issue.

In her seventh issue, Q.C. contends there is no evidence or insufficient evidence to support the amount of attorney's fees awarded to C.D. She complains that the testimony is not supported by time records and that recoverable fees were not segregated from fees that were not recoverable. She does not specify what fees were unrecoverable but awarded to C.D.

The reasonableness of an attorney's fee award is a question of fact and must be supported by competent evidence. ***In re M.A.N.M.***, 231 S.W.3d 562, 567 (Tex. App.–Dallas 2007, no pet.). There should be evidence of time spent by the attorney on the case, the nature of the preparation, the complexity of the case, the experience of the attorney, and the prevailing hourly rates. ***Id***. The court may also consider the entire record and the common knowledge of the lawyers and judges. ***Id***.

C.D.'s attorney testified that she has been practicing law since 1994 and practicing primarily family law for the last twelve years. She charges $220.00 an hour. She produced an exhibit listing the actions taken on the case and how much she charged for each action. She requested a total of $8,063.25 in attorney's fees. She also testified to an additional $306.00 in charges she wanted to include. She said that C.D. had paid her $8,500.00. The court awarded C.D.'s attorney $5,000.00 in attorney's fees to be paid by Q.C. as child support at $250.00 per month. The court's award is supported by the evidence.

A party seeking to recover attorney's fees is required to segregate fees between claims for which they are recoverable and claims for which they are not. ***In re A.M.W.***, 313 S.W.3d at 893. However, the opposing party must properly preserve for appellate review a contention that the fee claimant failed to segregate the fees sought. ***Green Int'l, Inc. v. Solis***, 951 S.W.2d 384, 389 (Tex. 1997). At trial, Q.C.'s attorney noted that she could not tell if times on the time sheet exhibit are reasonable. She also noted that the exhibit did not delineate between filing fees and legal fees and that parking is included in the exhibit. But nowhere did she object to the failure to segregate fees for claims for which fees are recoverable from claims for which they are not. Accordingly, Q.C. waived any error in the inclusion of unrecoverable fees, if any, in the award of attorney's fees. ***Id***. We conclude that the trial court did not abuse its discretion in awarding $5,000.00 to C.D.'s attorney. We overrule Q.C.'s seventh issue.

DISPOSITION

The trial court did not abuse its discretion in ordering that the parties are joint managing conservators with equal custody, the child's residence must be in Smith County, Jack Elementary School district, Q.C. shall not receive child support, the parties must communicate only in writing, and Q.C. must pay $5,000.00 in attorney's fees. However, the trial court erred in ordering mediation before future modification of the terms and conditions of conservatorship, possession, or support of K.L.D. Accordingly, we delete paragraph 15 of the trial court's October 13, 2010 modification order. As modified, we ***affirm*** the trial court's order.

JAMES T. WORTHEN
Chief Justice

Opinion delivered June 13, 2012.
Panel consisted of Worthen, C.J., Griffith, J, and Hoyle, J.

(PUBLISH)

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

JUNE 13, 2012

NO. 12-10-00386-CV

IN THE INTEREST OF K.L.D., A CHILD

Appeals from the 321st Judicial District Court
of Smith County, Texas. (Tr.Ct.No. 06-2830-D)

THIS CAUSE came to be heard on the appellate record and briefs filed herein; and the same being considered, it is the opinion of this court that the order of the trial court below should be modified and as modified, affirmed.

It is therefore ORDERED, ADJUDGED and DECREED that the following portion of the trial court's order is **DELETED**:

> 15. **Mediation**- IT IS ORDERED that before setting any hearing or initiating discovery in a suit for modification of the terms and conditions of conservatorship, possession, or support of the child, except in an emergency, the parties shall mediate, with Mr. Will Shelton serving as the mediator, the controversy in good faith. This requirement does not apply to actions brought to enforce this order or to enforce any subsequent modifications of this order. IT IS ORDERED that the party wishing to modify the terms and conditions of conservatorship, possession, or support of the child shall pay the mediator's fees for mediation and notify the other party by written notice of a desire to mediate the controversy by certified mail return receipt requested and by regular mail.

As **MODIFIED**, the remainder of the order of the trial court is **AFFIRMED**. It is further ORDERED that each party bear its own costs in this cause expended in this court; and that this decision be certified to the trial court below for observance.

James T. Worthen, Chief Justice.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.