NO. 12-18-00149-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE:	***§***	
BOBBY G. BENNETT, JR.,	***§***	***ORIGINAL PROCEEDING***
RELATOR	***§***	

MEMORANDUM OPINION

Relator B.G.B., Jr. filed this petition for writ of mandamus, contending in eight issues that the trial court abused its discretion. We deny the petition.[1]

BACKGROUND

The underlying suit is a divorce proceeding between B.G.B., Jr. and L.M.B. The parties are the parents of two children, B.T.B. and B.T.B.2.[2] The case proceeded to a seven day jury trial, followed by a four day bench trial. At the conclusion of the jury trial, the jury found that the mother, L.M.B., should be appointed sole managing conservator of the children. On February 16, 2017, Respondent entered a final decree of divorce ("Final Decree"), granting the parties a divorce, appointing L.M.B. as sole managing conservator, and appointing B.G.B., Jr. as possessory conservator of the children. L.M.B. was granted the exclusive right to designate the primary residence of the children. B.G.B., Jr. was granted "completely supervised" possession of the children one weekend per month, and was ordered to remain in the immediate presence of a supervisor at all times while he was with the children. Further, Respondent ordered that B.G.B., Jr. be permanently enjoined from passing any notes or written communications to the children except through the visitation supervisor; engaging in any electronic, video or audio communication

[1] The real party in interest is L.M.B. The respondent is the Honorable Randall Rogers, Judge of the County Court at Law No. 2, Smith County, Texas.

[2] Both children have the same initials. We will refer to the younger child as B.T.B.2.

with the children other than during his periods of possession and under the supervision of the visitation supervisor; and responding to any communication from the children.

On October 26, 2017, B.G.B., Jr. filed a first amended original petition to modify the parent-child relationship, stating that the circumstances of the children, a conservator, or other party affected by the Final Decree have materially and substantially changed since the date of the Final Decree. He requested possession and access of the children as provided by the standard possession order, and stated that supervised visitation and possession were no longer in the best interest of the children. Later, B.G.B., Jr. requested that Respondent confer with both children in chambers without counsel. Respondent appointed an amicus attorney for the children and ordered B.G.B., Jr. and L.M.B. to each pay an initial amicus fee deposit to the amicus attorney.

Respondent held six days' worth of hearings from November 16, 2017 to April 10, 2018,[3] on B.G.B., Jr.'s and L.M.B.'s applications for temporary orders.[4] After the fourth hearing, the amicus attorney filed a motion for time limits on the temporary orders hearing, alleging that B.G.B., Jr. had ample time to present evidence relating to his allegations and request for temporary orders. B.G.B., Jr. objected to the motion. On February 26, 2018, Respondent granted the amicus attorney's motion, and found that setting reasonable time limits for the conclusion of the temporary hearing provided all parties with the opportunity to fairly present relevant evidence on the issues of temporary orders, and complied with Rule 611 of the Texas Rules of Evidence. Respondent ordered that B.G.B., Jr. be granted an additional thirty minutes of direct and cross examination, and that L.M.B. and the amicus attorney each be granted an additional one hour of direct and cross examination.

On April 11, Respondent entered temporary orders in the suit to modify the parent-child relationship, denying the temporary relief requested by B.G.B., Jr., and granting the temporary relief requested by L.M.B. and the amicus attorney. Respondent ordered a complete forensic child custody evaluation be performed to assist the parties, counsel, and Respondent in determining custody, possession, and access matters and, in conjunction, ordered psychological evaluations of B.G.B., Jr. and B.T.B.2. Further, Respondent ordered an additional temporary injunction against B.G.B., Jr. prohibiting him from, among others, communicating with L.M.B., B.T.B., or B.T.B.2

[3] B.T.B. turned eighteen years of age between the first amended petition to modify the parent-child relationship and the first hearing on November 16, 2017.

[4] The record does not include L.M.B.'s application for temporary orders.

in any matter, directly or indirectly; disturbing the peace of B.T.B. or B.T.B.2; and discussing any litigation concerning B.T.B.2 in the presence or within the hearing of the child or on any form of social media. Finally, Respondent ordered that B.G.B., Jr. communicate with B.T.B.2 only during court authorized directly supervised possession and access, and that all such supervised possession and access be strictly and directly supervised at all times, including any and all conversations between B.G.B., Jr. and B.T.B.2.

AVAILABILITY OF MANDAMUS

Mandamus relief is available when, under the circumstances of the case, the facts and law permit the trial court to make but one decision—and the trial court has refused to make that decision—and remedy by appeal to correct the ruling is inadequate. ***Proffer v. Yates***, 734 S.W.2d 671, 673 (Tex. 1987). Mandamus is allowed under the Texas Family Code under these circumstances. *See* ***In re Knotts***, 62 SW.3d 922, 923 n.1 (Tex. App.–Texarkana 2001, orig. proceeding). Because temporary orders are not appealable, mandamus is an appropriate remedy when a trial court abuses its discretion in issuing temporary orders in a suit affecting the parent-child relationship. *See* ***In re Derzapf***, 219 S.W.3d 327, 335 (Tex. 2007) (orig. proceeding).

To be entitled to mandamus relief, B.G.B., Jr. must establish a trial court clearly abused its discretion and he lacks an adequate remedy by appeal. ***In re Green***, 385 S.W.3d 665, 668 (Tex. App.–San Antonio 2012, orig. proceeding) (citing ***In re Prudential Ins. Co. of Am.***, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding)). An abuse of discretion with respect to factual matters occurs if the record establishes the trial court could reasonably have reached only one decision. ***Id.*** at 668–69 (citing ***Walker v. Packer***, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)). A party's right to mandamus relief generally requires a predicate request for some action and a refusal of that request. ***In re Perritt***, 992 S.W.2d 444, 446 (Tex. 1999) (orig. proceeding).

TIME LIMITS

In his first issue, B.G.B., Jr. argues that Respondent abused his discretion when he overruled B.G.B., Jr.'s objection by limiting the amount of time that he had to "present his entire case" on the issue of primary conservatorship of B.T.B.2. He also complains that he was limited to thirty minutes and that L.M.B.'s attorney and the amicus attorney each received twice as much time to present their cases.

Applicable Law

Every trial court has the inherent power to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants. ***State v. Gaylor Inv. Trust P'ship***, 322 S.W.3d 814, 819 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing ***Hoggett v. Brown***, 971 S.W.2d 472, 495 (Tex. App.—Houston [14th Dist.] 1997, pet. denied)). 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. *See* ***id.*** Further, according to Rule 611 of the Texas Rules of Evidence, the trial court has the authority to 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. *See* TEX. R. EVID. 611(a).

Analysis

As noted above, the amicus attorney filed a motion for time limits, stating that the court heard over eight hours of testimony during the previous three hearings. According to the motion, B.G.B., Jr. had "ample time to present evidence relating to his allegations." B.G.B., Jr. objected to the motion, stating that additional testimony from B.G.B, Jr. and B.T.B.2 was necessary to his contention that there was a material change of circumstances since the Final Decree. However, he noted that in the previous four hearings, two expert witnesses submitted to direct and cross examination, B.T.B.2 was interviewed by Respondent in chambers and submitted to direct and cross examination, and B.G.B., Jr. underwent direct and cross examination. On February 26, 2018, Respondent granted the motion, granting B.G.B., Jr. an additional thirty minutes for direct and cross examination, and granting L.M.B. and the amicus attorney each an additional one hour of direct and cross examination.

The evidence shows that Respondent held hearings on B.G.B., Jr.'s application for temporary orders on November 16, 2017, December 7, 2017, December 8, 2017, January 2, 2018, April 9, 2018, and April 10, 2018, a total of six hearings. Moreover, no time limits were imposed on B.G.B, Jr. for the first four hearings during which his counsel examined at least two expert witnesses, his minor son, and himself. Because Respondent has the inherent power to control the disposition of cases on its docket and to avoid wasting time, it was not unreasonable for Respondent to impose time limits on all parties for the remainder of the hearing on temporary orders. *See* ***Gaylor Inv. Trust P'ship***, 322 S.W.3d at 819; TEX. R. EVID. 611(a). Contrary to

B.G.B., Jr.'s allegations in his brief, L.M.B. and the amicus attorney did not receive "twice as much time" to present their cases. Rather, he was allowed unlimited time to present his case in the first four hearings. Under these circumstances, we conclude that Respondent did not abuse his discretion by ordering time limits for the remainder of the hearings on temporary orders. Thus, B.G.B., Jr. has not established his entitlement to mandamus relief with respect to his first issue.

INTERVIEW OF MINOR CHILD

In his second issue, B.G.B., Jr. argues that Respondent abused his discretion by failing to interview the minor child, B.T.B.2, in chambers in order to determine his wishes regarding conservatorship. In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the attorney ad litem for the child, the court shall interview in chambers a child twelve years of age or older and may interview a child under twelve years of age to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence. TEX. FAM. CODE ANN. § 153.009(a) (West 2014).

On October 26, 2017, B.G.B., Jr. filed a motion for the judge to confer with the children in chambers to determine each child's wishes regarding possession. During the temporary orders hearings, Respondent conferred with B.T.B.2 in chambers and B.G.B., Jr. called B.T.B.2 as a witness. At the time of the temporary orders hearings, B.T.B. was no longer a minor child and there is no evidence that he was called as a witness. However, on February 27, 2018, B.G.B., Jr. filed a second motion for the judge to confer with B.T.B.2 in chambers. According to a May 30, 2018 notice of setting from the court coordinator, this second motion was set for hearing on July 9, 2018. The record contains no order by Respondent denying B.G.B., Jr.'s second motion to confer. *See* ***S.A.B. v. Schattman***, 838 S.W.2d 290, 295 (Tex. App.—Fort Worth 1992, no pet.).

Generally, the record must contain either a written order from the trial court or a reporter's record of the trial court's oral order denying a motion for relief. *See* ***In re Bill Heard Chevrolet, Ltd.***, 209 S.W.3d 311, 316 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding). Mandamus is not available to compel a trial court to perform an act if the action has not first been requested and then refused by the trial court. *See* ***In re Perritt***, 992 S.W.2d at 446. In this case, there is no record of a ruling by Respondent on B.G.B., Jr.'s second motion to confer with the minor child. Accordingly, B.G.B., Jr. has not established his entitlement to mandamus relief as to issue two.

TESTIMONY OF MINOR CHILD

In his third issue, B.G.B., Jr. contends that Respondent abused his discretion by failing to allow the minor child to testify during the hearing on temporary orders regarding his wishes as to conservatorship and the person with the exclusive right to determine the child's primary residence.

Applicable Law

The best interest of the child shall always be the primary consideration in determining the issues of conservatorship. TEX. FAM. CODE ANN. § 153.002 (West 2014); ***Gillespie v. Gillespie***, 644 S.W.2d 449, 451 (Tex. 1982). "The trial court is given wide latitude in determining the best interests of a minor child." ***Gillespie***, 644 S.W.2d at 451. "The question of conservatorship of a child is left to the sound discretion of the trial court when it sits as trier of fact." ***Echols v. Olivarez***, 85 S.W.3d 475, 477 (Tex. App.–Austin 2002, no pet.). Because the trial court is in the best position to observe the demeanor of the witnesses and can "'feel' the forces, powers, and influences that cannot be discerned by merely reading the record[,]" we will not find an abuse of discretion as long as there is some evidence of substantive and probative character to support the trial court's decision. ***Id.*** (quoting ***Jeffers v. Wallace***, 615 S.W.2d 252, 253 (Tex. Civ. App.—Dallas 1981, no writ)).

Analysis

B.G.B., Jr. argues that B.T.B.2 was not allowed to testify at the April 10, 2018 hearing even though he served the minor child with a subpoena. The record shows that the minor child, B.T.B.2, was interviewed in chambers by Respondent and testified at least once in the hearings on the temporary orders regarding his wishes as to conservatorship and the person with the exclusive right to designate his primary residence. During the April 9, 2018 hearing, B.G.B., Jr., pro se, requested that B.T.B.2 be a witness during the hearing and noted that the minor child had already testified twice during the hearings. According to B.G.B., Jr., the minor child would be a witness regarding litigation of the attorney's fees and "his texts." The amicus attorney objected and Respondent denied B.G.B., Jr.'s request.

Again, Respondent has the inherent power to control the disposition of cases on its docket and to avoid wasting time, and thus, it was not unreasonable for Respondent to deny B.G.B, Jr.'s request for the minor child to testify again during the hearings on temporary orders. *See* ***Gaylor Inv. Trust P'ship***, 322 S.W.3d at 819; TEX. R. EVID. 611(a). Contrary to B.G.B., Jr.'s allegations in his brief, he received ample opportunity to question the minor child regarding his wishes because

the minor child testified at least twice during the hearings and was interviewed in chambers by Respondent. Even if the minor child expressed his desire to live with his father, that decision is left to the sound discretion of Respondent. *See* ***Echols***, 85 S.W.3d at 477. Under these circumstances, we conclude that Respondent did not abuse his discretion by denying B.G.B., Jr.'s request to have the child testify for a possible third time during the hearings on temporary orders. Thus, B.G.B., Jr. has not established his entitlement to mandamus relief regarding issue three.

TEMPORARY INJUNCTION REGARDING ADULT CHILD

In his fourth issue, B.G.B., Jr. argues that Respondent abused his discretion by ordering that he be temporarily enjoined from communicating in any manner with his adult child, B.T.B. Generally, a party seeking mandamus relief must bring forward all that is necessary to establish his claim for mandamus relief. *See* TEX. R. APP. P. 52. The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the appendix or record. *See* TEX. R. APP. P. 52.3(h). Here, B.G.B., Jr.'s fourth issue contains no citations to authorities to support his argument. Absent the required citations to authorities, B.G.B., Jr. cannot show that Respondent abused his discretion by entering an order prohibiting him from any contact with his son, B.T.B.

Even if B.G.B, Jr. properly included citations to authorities in his petition, he still would not prevail. The record shows that exhibits admitted during the hearings on the temporary orders by the amicus attorney and L.M.B. contained numerous texts or emails from B.G.B., Jr. to B.T.B. The content of these communications could be characterized as abusive and hostile towards the adult child. B.G.B., Jr. stated that the adult child would be "confronted in court under oath for every hateful word" that he had said; that B.G.B., Jr. contacted the headmaster of the child's school regarding the adult child's attitude and threatening actions; that he needed "another Adoption Day" like B.G.B., Jr. and B.T.B.2 had; that the adult child had "divorced" him and that it would not "go well" for him; that the adult child would need a lawyer if he continued "on this path"; and that the adult child was living in "rebellion." Under these circumstances, we conclude that Respondent did not abuse his discretion by enjoining B.G.B., Jr. from communicating in any manner with B.T.B. Therefore, B.G.B., Jr. has not established his entitlement to mandamus relief concerning issue four.

PSYCHOLOGICAL EVALUATION

In his fifth issue, B.G.B., Jr. contends that Respondent abused his discretion by ordering a psychological evaluation of him and his minor child, B.T.B.2. Further, he argues, Respondent abused his discretion in ordering him to pay all of the costs of such evaluation because it was ordered on L.M.B.'s behest. Again, a party seeking mandamus relief must bring forward all that is necessary to establish his claim for mandamus relief. *See* TEX. R. APP. P. 52. The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the appendix or record. *See* TEX. R. APP. P. 52.3(h). Here, B.G.B., Jr.'s fifth issue contains no citations to authorities to support his argument. Absent the required citations to authorities, B.G.B., Jr. cannot show that Respondent abused his discretion by ordering the psychological evaluations or by ordering him to pay for the evaluations.

Even if B.G.B., Jr. had filed a proper petition that included citations to authorities, he would not have prevailed. A court may order the preparation of a child custody evaluation regarding the circumstances and condition of a child who is the subject of a suit, a party to a suit, and the residence of any person requesting conservatorship of, possession of, or access to a child who is the subject of the suit. *See* TEX. FAM. CODE ANN. § 107.103(a) (West Supp. 2017). Here, Respondent ordered psychological evaluations of B.G.B., Jr. and B.T.B.2 in order for an appointed psychologist to perform a complete forensic child custody evaluation. Although B.G.B., Jr. stated in his brief that psychological evaluations had already been performed in the case, the record shows that these evaluations were conducted before the trial resulting in the Final Decree, and there is no evidence that these prior evaluations were child custody evaluations as permitted by the family code. Thus, Respondent did not abuse his discretion in ordering psychological evaluations of B.G.B., Jr. and B.T.B.2 in order to prepare a child custody evaluation. Accordingly, B.G.B., Jr. has not established his entitlement to mandamus relief with respect to issue five.

INTERIM FEES

In his sixth and seventh issues, B.G.B., Jr. contends that Respondent abused his discretion by ordering him to pay all of the amicus attorney's interim fees and all of L.M.B.'s interim attorney's fees.

Regarding interim amicus attorney's fees, a party seeking mandamus relief must bring forward all that is necessary to establish his claim for mandamus relief. *See* TEX. R. APP. P. 52. The petition must contain a clear and concise argument for the contentions made, with appropriate

citations to authorities and to the appendix or record. *See* TEX. R. APP. P. 52.3(h). Here, B.G.B., Jr.'s sixth issue contains no citations to authorities to support his argument. Absent the required citations to authorities, B.G.B., Jr. cannot show that Respondent abused his discretion by ordering him to pay the amicus attorney's interim fees.

Even if B.G.B., Jr. had filed a proper petition with citations to authorities, he would not prevail on either issue. The record shows that Respondent ordered B.G.B., Jr. to pay the amicus attorney's interim fees on February 26, 2018 in the amount of $3,806.18 and on April 10, 2018 in the amount of $10,000.00. In the temporary orders, Respondent ordered B.G.B., Jr. to pay reasonable interim attorney's fees and expenses of L.M.B.'s attorney in the amount of $22,421.00. In general, mandamus will not lie to alter the trial court's award of interim attorney's fees. ***In re Bissell***, 109 S.W.3d 87, 89 (Tex. App.—El Paso 2003, orig. proceeding [mand. denied]). This is because, in general, when the trial court awards interim attorney's fees, there is an adequate remedy at law. *See* ***id.*** The award of attorney's fees may be reviewed on appeal of a final judgment. *See* ***In re Ford Motor Co.***, 988 S.W.2d 714, 722 (Tex. 1998) (orig. proceeding) (fees as discovery sanction). Mandamus lies to correct the award of interim fees only in extreme cases in which a "party's ability to prosecute the case further is jeopardized" by the party's payment of, or inability to pay, the fees. ***Id.*** at 723. B.G.B., Jr. presented no evidence that payment of the amicus attorney's interim fees or L.M.B.'s interim attorney's fees would jeopardize his ability to continue the litigation. Therefore, B.G.B., Jr. has not established his entitlement to mandamus relief regarding issues six and seven.

HEARING ON MOTION

In his eighth issue, B.G.B., Jr. argues that Respondent abused his discretion by refusing to set a hearing on his Motion for Enforcement by Contempt and Order to Appear unless he appeared in court to explain his reasons for requesting the order. B.G.B., Jr. stated in his brief that on May 18, 2018, he filed a Motion for Enforcement and Contempt and Order to Appear. According to a May 30, 2018 notice from the court coordinator, numerous motions filed by B.G.B., Jr. and L.M.B. were to be heard on July 9, 2018. B.G.B., Jr.'s motion does not appear on the list of motions to be heard. On June 1, 2018, the court coordinator notified B.G.B., Jr. that Respondent would hold a hearing on June 13, 2018 to discuss B.G.B., Jr.'s reasons for filing an Order to Appear. When B.G.B., Jr. asked the reason for the hearing, the court coordinator replied that Respondent wanted

to have a hearing on the motion that B.G.B., Jr. filed, presumably his motion for enforcement and contempt.

Generally, the record must contain either a written order from the trial court or a reporter's record of the trial court's oral order denying a motion for relief. *See* ***In re Bill Heard Chevrolet, Ltd.***, 209 S.W.3d at 316. Moreover, mandamus is not available to compel a trial court to perform an act if the action has not first been requested and then refused by the trial court. *See* ***In re Perritt***, 992 S.W.2d at 446. In this case, there is no record of the motion filed by B.G.B., Jr. requesting a hearing on the motion or a ruling by Respondent refusing to hear his Motion for Enforcement and Contempt. Accordingly, B.G.B., Jr. has not established his entitlement to mandamus relief as to issue eight.

DISPOSITION

Because B.G.B., Jr. has not shown entitlement to mandamus relief with respect to his eight issues, we ***deny*** his petition for writ of mandamus.

BRIAN HOYLE
Justice

Opinion delivered August 31, 2018.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

AUGUST 31, 2018

NO. 12-18-00149-CV

BOBBY G. BENNETT, JR.,
Relator
V.

HON. RANDALL ROGERS,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by Bobby G. Bennett, Jr.; who is the relator in Cause No. 17-2443-F, pending on the docket of the County Court at Law No. 2 of Smith County, Texas. Said petition for writ of mandamus having been filed herein on June 11, 2018, and the same having been duly considered, because it is the opinion of this Court that a writ should not issue, it is therefore CONSIDERED, ADJUDGED and ORDERED that the said petition for writ of mandamus be, and the same is, hereby **denied**.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.