Opinion issued December 21, 2017.

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00876-CV

IN THE INTEREST OF H.C.C., A CHILD

On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Case No. 68312

MEMORANDUM OPINION

In nineteen issues, appellant, R.C.C., Jr. (Father), is appealing a final judgment naming him and appellee, W.J.M.C. (Mother), as their child's joint managing conservators and granting Mother the exclusive right to determine the child's primary residence. We modify Father's child support obligation and affirm the trial court's order as modified.

Background

Mother and Father were divorced on November 23, 2009. The divorce decree named Mother and Father as H.C.C.'s joint managing conservators, gave Father the right to determine the child's primary residence, and ordered a standard possession order for Mother. Father remarried in 2011.

A. Allegations of Abuse and Petitions Seeking Modification of SAPCR[1] Order or Termination of Parental Rights

Father filed five complaints against Mother with Child Protective Services after their divorce. The first three complaints coincided with Father's filing of petitions to modify the divorce decree and/or seeking termination of Mother's parental rights to H.C.C.

Father filed a complaint against Mother with CPS on March 8, 2012, alleging that she had physically abused H.C.C. because the boy had returned from her home with a scratch on his eyelid and, on multiple occasions, bruises on his arms that could have been the result of Mother forcefully grabbing him. Father hired therapist Kendra Sullivan on March 28, 2012, to treat H.C.C. and determine whether any abuse had occurred.

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[1] A "[s]uit affecting the parent-child relationship," or SAPCR, is defined by the Texas Family Code as a suit wherein "the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested." TEX. FAM. CODE ANN. § 101.032(a) (West 2014).

On April 11, 2012, Father filed a petition seeking to modify the divorce decree's standard possession order in which he raised the same allegations of physical abuse that he had raised in his March 8, 2012 complaint to CPS. He further alleged that H.C.C., who was five-years old at the time, had informed him that Mother breast feeds him. Mother filed a counter-petition on April 24, 2012, seeking, among other things, sole managing conservatorship of H.C.C. Both parties also requested injunctive relief.

After a hearing on April 26, 2012, the trial court entered temporary orders on May 24, 2012 that awarded Mother supervised visitation until November 2, 2012, when her visitation schedule would revert to the standard possession order set forth in the divorce decree. The trial court also ordered Mother, Father, and Stepmother to register and attend a parent education and family stabilization course and submit to random drug testing at the request of another party. Mother was also ordered to attend an anger management course.[2] The trial court also temporarily enjoined Mother and Father from "allowing [H.C.C.] to have physical contact with the parties[']genitals, breasts or anus."

The CPS caseworker who investigated Father's allegations interviewed Mother, Father, Stepmother, H.C.C.'s elementary school principal, his pediatrician,

[2] The case was transferred from Fort Bend County to the 300th Judicial District Court of Brazoria County, Texas in June 2012 based on Father's and H.C.C.'s change of residence.

Sullivan, and others. The caseworker's file reflects that H.C.C. did not make any outcries of abuse to her or anyone other than Father, Stepmother, his paternal grandmother, and Sullivan. H.C.C. did, however, tell Sullivan in April 2012 that Mother bathed with him and grabbed him forcibly on his arms. He also "admitted to sucking on his mother's breast," and stated that Mother had told him to stop doing it. He also informed Sullivan that he did it when he was a baby and that he liked doing it. Sullivan told CPS that she considered this inappropriate behavior, not sexual abuse.

CPS noted in its report that "[d]ue to the pattern of bruises [as evidenced by the fifteen photographs of H.C.C. that were provided by Father] and the father's and step-mother's insistence that the child was making outcries of abuse/neglect to others and not to the investigator, the case was sent to the Forensic Assessment Center Network for review." The doctor at the Forensic Assessment Center Network who reviewed the case, including the photographs of H.C.C. taken by Father, informed CPS that he "strongly suspect[ed] physical abuse." The CPS caseworker determined "[d]ue to the evidence of physical abuse between the mother and [H.C.C.], the mother could be considered an inappropriate caregiver."

CPS closed the March 2012 case on May 8, 2012, and informed the parties that CPS had found that there was a reason to believe that Mother had physically abused H.C.C.

Father requested a jury trial on August 8, 2012.

After a hearing on August 23, 2012, the trial court rendered an agreed order modifying the divorce decree on October 2, 2012. The October 2012 Order awarded Mother visitation in accordance with the standard possession order beginning on October 2, 2012.

Father filed a second complaint against Mother with CPS on November 21, 2012, alleging that similar instances of physical and sexual abuse had occurred since October 2, 2012. Five days later, Father filed a petition to terminate Mother's parental rights based on the same allegations raised in his complaint to CPS. At Father's request, the trial court issued a restraining order against Mother. After learning that his first expert, Sullivan, could not give an opinion as to whether any abuse occurred after October 2, 2012, Father non-suited his petition in December 2012, and Mother regained visitation with H.C.C.

After sending H.C.C. to be interviewed at the Children's Assessment Center and speaking with H.C.C., Mother, Father, Stepmother, Sullivan, and others, CPS notified the parties on January 25, 2013 that it had concluded its investigation in the November 2012 case and "ruled out" Father's allegations of abuse, i.e., CPS found that it was "reasonable to conclude that the alleged abuse or neglect did not occur."

Father hired a new expert, psychiatrist Dr. Harvey A. Rosenstock, to evaluate H.C.C. in December 2012. After Dr. Rosenstock informed him that Mother had

sexually and emotionally abused H.C.C. in late December 2012, Father filed a third CPS complaint on February 6, 2013. In his affidavit attached to Father's February 2013 petition, Dr. Rosenstock averred that, after reviewing photographs of bruises on H.C.C., it was his opinion that the photographs showed "pinch" bruises on H.C.C.'s arms, and he opined that the boy had been sexually, physically, and mentally abused by Mother. Dr. Rosenstock later testified at trial that, in his opinion, Mother sexually abused H.C.C. by forcing the child to suck on her breasts and she emotionally abused him when she told him that she wanted Stepmother to be killed by a tornado. Dr. Rosenstock testified that H.C.C. had never made any direct statements to him about any physical abuse.

CPS closed this case within a matter of days because the agency determined that it had already addressed Father's allegations during its prior investigation in which it had ruled them out.

Father filed another petition on February 13, 2013, requesting that the court either terminate Mother's parental rights or restrict her to supervised visitation. The petition is based on the same allegations of abuse raised in Father's February 6, 2013 complaint to CPS. Father also got a restraining order against Mother. Pursuant to an agreed order between the parties, Mother was placed on supervised visitation on February 28, 2013.

Father filed a fourth complaint against Mother with CPS on April 24, 2013, raising similar allegations of sexual abuse. As with the February 2013 complaint, CPS closed this case within days because it had already addressed Father's allegations during its November 2012 investigation and ruled the allegations out.

On June 26, 2013, the trial court adopted a Rule 11 agreement between Mother and Father in which the parties had agreed to have Father's allegations independently evaluated. Because the original doctor that Mother and Father had agreed would conduct the evaluation was no longer accepting clients, the court appointed Dr. Carmen Petzold to investigate and assess whether any inappropriate sexual behavior has occurred between Mother and H.C.C., including considering if either parent or step-parent has coached or otherwise influenced the child. The court ordered Mother and Father to cooperate with Dr. Petzold and to each pay fifty percent of the costs for Dr. Petzold's services.

On November 1, 2013, Mother filed a counter-petition seeking sole managing conservatorship and supervised visitation for Father. In her affidavit attached to the petition, Mother averred that "[a]t the behest of the Amicus and in accordance with my belief that things would be resolved in an expedited fashion I have agreed to restricted access to my child. It has now been weeks and I feel like [Father] is merely stalling the process because I am not seeing our child on a regular basis." Mother

also requested a temporary injunction against Father based on the facts set forth in her affidavit.

Although Dr. Petzold had not completed her report, the trial court entered agreed temporary orders on June 23, 2014, awarding Mother unsupervised visitation in accordance with the standard possession order and possession for the month of July 2014.

During trial, Dr. Petzold testified that she had met with Mother seven or eight times, beginning on May 22, 2013, and that she needed to address one issue with Mother relating to her prior substance abuse. According to Dr. Petzold, Father did not come to her office until July 11, 2013, and he did not return for a second appointment until the next spring. She also testified that it was possible that Father had contacted her during the intervening months to schedule additional appointments, but she would need to check her records to confirm. She also testified that Mother provided her with some documentation, whereas Father had not, and that Mother paid her almost $2,000 and Father had paid her $700.

According to Dr. Petzold, she needed to finish her work with the parents and review all of the CPS records and the CAC interview before meeting with H.C.C. Dr. Petzold testified that she never received a full copy of the CPS records and that she only had documents showing that the allegations had been ruled out. Dr. Petzold

also testified that she could not give an opinion in this case without reviewing these records, meeting with H.C.C., and observing H.C.C. with each of his parents.

On September 4, 2014, Mother filed a motion for temporary orders in which she alleged that Father had been arrested and charged with domestic violence that occurred while he was living with Stepmother. She further alleged that although Father and Stepmother initially separated and Father moved out of their home, they have since "reconciled and the child is back into the same home environment where the violence occurred."

On September 13, 2014, Father filed a fifth complaint against Mother with CPS alleging that she had physically abused H.C.C. during a weekend visit because the boy had returned from Mother's house with bruises on his arms and his eye was swollen. H.C.C. was diagnosed with pink eye. After speaking with H.C.C.'s school nurse, CPS closed that case because the agency determined that it "[d]oesn't appear to involve abuse, neglect, or risk."

Father filed a jury demand on October 27, 2014, and a supplemental petition dropping his request to terminate Mother's parental rights on October 31, 2014.

B. Trial

After denying Father's request for a jury trial, a bench trial was held in the current modification suit on November 12, 17, 19 and 20, 2014. Mother, Father, Dr. Rosenstock, Mother's mother, Dr. Petzold, and a CPS representative testified at trial.

At the conclusion of the trial, the court denied the parties' requests for sole managing conservatorship, and appointed Mother as the joint managing conservator with the right to establish H.C.C.'s primary residence and the exclusive right to make educational decisions and psychological decisions for the child. Father appealed and requested Findings of Fact and Conclusions of Law. The trial court issued Findings of Fact and Conclusions of Law on May 29, 2015.

Denial of Jury Trial

In his first issue, Father argues that the trial court abused its discretion by denying his timely request for a jury trial. Mother argues that Father was not entitled to a jury trial because Father's October 27, 2014 jury demand was untimely, and the 2012 Order was a final order, and therefore, the court could not consider Father's August 8, 2012 jury trial request for purposes of the current modification proceeding.

A. Standard of Review and Applicable Law

1. Request for Jury Trial

We review a trial court's denial of a request for a jury trial for abuse of discretion. *See Howell v. Tex. Workers' Comp. Comm'n*, 143 S.W.3d 416, 438 (Tex. App.—Austin 2004, pet. denied) (citing *Mercedes–Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996)). The trial court abuses its discretion if it acts without reference to any guiding rules or principles or its decision is arbitrary or unreasonable. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). The trial

court does not abuse its discretion if some evidence reasonably supports its decision. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002) (citing *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978)).

The Texas Constitution provides that the right of trial by jury "shall remain inviolate." TEX. CONST. art. I, § 15. However, the right to a trial by jury is not absolute in civil cases. *Howell*, 143 S.W.3d at 438. A party must comply with the rules of civil procedure, which specify that a party must file a written request for a jury and pay a jury fee not less than thirty days before the date set for trial of the cause on the non-jury docket. TEX. R. CIV. P. 216.

2. Finality of Order or Judgment

The resolution of Father's first issue turns, in part, on whether the October 2012 Order is a final and appealable order. The finality of an order is a legal question we review de novo. *See In re Blankenhagen*, 513 S.W.3d 97, 100 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding, pet. dism'd); *see also Garcia v. Comm'rs Court*, 101 S.W.3d 778, 783 (Tex. App.—Corpus Christi 2003, no pet.).

A "final order" rendered under Title 5 of the Family Code is appealable. TEX. FAM. CODE ANN. § 109.002(b) (West Supp. 2017). A judgment is final "if it disposes of all pending parties and claims in the record." *Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); *see also Brejon v. Johnson*, 314 S.W.3d 26, 33 (Tex. App.—Houston [1st Dist.] 2009, no pet.). The law does not require that a final order

be in any particular form; therefore, whether an order is final must be determined from its language and the record in the case. *Lehmann*, 39 S.W.3d at 195. In the event of vagueness in the judgment or order challenged, the record on appeal will determine finality. *See M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 674–75 (Tex. 2004) (citing *Lehmann*, 39 S.W.3d at 206). Thus, there must be some "clear indication that the trial court intended the order to completely dispose of the entire case." *Lehmann*, 39 S.W.3d at 205.

The inclusion of a Mother Hubbard clause in an order rendered without a conventional trial on the merits does not, on its face, implicitly dispose of claims not expressly mentioned in the order. *See Farm Bureau Cty. Mut. Ins. Co. v. Rogers*, 455 S.W.3d 161, 164 (Tex. 2015). Instead, there must be evidence in the record to prove the trial court's intent to dispose of any remaining issues. *See id.* (citing *Lehmann*, 39 S.W.3d at 205–06).

B. Analysis

Father filed jury demands on August 8, 2012 and October 27, 2014. When Father requested a jury trial prior to the November 2014 trial, Mother and the amicus attorney objected and argued that he was not entitled to a jury trial because the October 27, 2014 jury demand was untimely, and the October 2012 Order was a final order, and therefore, the court could not consider the August 8, 2012 request for purposes of the current modification proceeding. Father argued that the October

2012 Order was interlocutory, and therefore his August 8, 2012 jury request was timely and entitled him to a jury trial.

An analysis of the finality of the October 2012 Order requires an examination of the order itself and the record leading up to the order. The other relevant pleadings and orders are Father's April 11, 2012 petition to modify the parent child relationship, Mother's April 24, 2012 counter-petition, and the May 24, 2012 Temporary Orders.

The October 2012 Order is an agreed order with a Mother Hubbard clause stating that "all relief requested in this case and not expressly granted is denied." While a Mother Hubbard clause does not implicitly dispose of any claims that are not expressly addressed by the order when there has been no trial on the merits, Father's agreement to the October 2012 Order containing a Mother Hubbard provision indicates that he intended to abandon any claims in the 2012 modification suit that were not expressly addressed by the agreed order. *See Rogers*, 455 S.W.3d at 164.

In his April 2012 petition to modify, Father asked the court to issue an order either denying Mother any access to H.C.C. or limiting her access to supervised visitation, and to order Mother to execute a bond or deposit a security conditioned on Mother's compliance with such an order. Father also asked the court to issue a temporary restraining order against Mother, enter temporary injunctions prohibiting

her from engaging in certain conduct, and to make such injunctions permanent. In her counter-petition to modify, Mother asked to be named the conservator with the right to designate H.C.C.'s primary residence, and the conservator with the sole right to make medical and educational decisions for H.C.C.

The pleadings demonstrate that both Father and Mother requested changes to the terms of their conservatorship, possession, and access to H.C.C. Although the October 2012 Order did not expressly identify Mother's and Father's requested relief, the order included provisions addressing all of these claims raised in their petitions to modify, i.e., conservatorship, possession, and access to H.C.C. By doing so, the order implicitly disposed of such claims, even if it did not award Father all of the relief he requested, i.e., ordering Mother to execute a bond or make a security deposit conditioned on Mother's compliance with the order.

With respect to Father's requests for temporary and permanent injunctions, Father argues that the October 2012 Order cannot be final because it includes "temporary injunctions" which "temporarily enjoin" the parties from certain enumerated acts involving H.C.C. and makes no mention of how and when such temporary injunctions will be resolved or made permanent. He also argues that the order is interlocutory because it did not dispose of Father's claim for permanent injunctions.

An injunction, however, may be permanent even though it is identified as "temporary." *See In re B.G.*, No. 14-04-00944-CV, 2006 WL 1594043, at *2 (Tex. App.—Houston [14th Dist.] June 13, 2006, no pet.) (stating injunction in modification order labeled as "temporary" is, nonetheless, permanent); *see also Elizondo v. Williams*, 643 S.W.2d 765, 767 (Tex. App.—San Antonio 1982, no writ) (recognizing that characterization of injunction as temporary or permanent depends on injunction's characteristics and function). In this case, the "temporary" injunctions included in the October 2012 Order are effectively permanent injunctions because they are for an unlimited duration and the order's language does not indicate that any additional hearings or proceedings were contemplated with regard to the imposition of such injunctions. *See Brines v. McIlhaney*, 596 S.W.2d 519, 523–24 (Tex. 1980) (stating conservatorship provisions in final divorce decree were final although labeled "temporary" because all controverted matters were resolved and nothing indicated further hearing was contemplated). Furthermore, the order's injunctions, i.e., prohibiting Mother and Father from using corporal punishment to discipline H.C.C., making disparaging remarks about the other in H.C.C.'s presence, discussing the litigation with H.C.C., and allowing H.C.C. to come into physical contact with either party's genitals, breasts, or anus, are intended to protect H.C.C.'s ongoing best interest and such injunctions are not unique to

interlocutory orders and are often included in final orders in SAPCRs, including divorce decrees.[3]

Father also argues that the October 2012 Order is interlocutory because it does not resolve the May 24, 2012 Temporary Orders. Specifically, Father points out that the October 2012 Order does not dispose of the requirement that the parties register and attend a parent education and family stabilization course, and it did not dispose of the order for random drug testing. The October 2012 Order states that "[a]ll other terms of the prior orders not specifically modified in this order shall remain in full force and effect."

A provision in the May 24, 2012 Temporary Orders required Father, Mother, and Stepmother to "each individually register to attend a parent education and family stabilization course . . . approved by the court no later than May 15, 2012" and file a file proof of completion with the court within ten days of completing the course. The record reflects that all three attended a parent education and family stabilization

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[3] *See, e.g., Moreno v. Perez*, 363 S.W.3d 725, 740 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (appeal of final order permanently enjoining mother from using corporal punishment as method of discipline); *O'Connor v. O'Connor*, 245 S.W.3d 511, 515 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (appeal of final divorce decree permanently enjoining parent from making disparaging remarks regarding other parent in children's presence and from discussing or referring to any issues or proceedings related to lawsuit); *Arevalo v. Millan*, No. 01-97-01123-CV, 1999 WL 1054249, at *1 (Tex. App.—Houston [1st Dist.] Nov. 18, 1999, no pet.) (mem. op., not designated for publication) (appeal of final divorce decree prohibiting parents from using corporal punishment and "engaging in sexual activity and using alcohol and drugs while in possession of the children").

course on or before May 27, 2012. Thus, this provision of the temporary order was satisfied prior to the entry of the October 2012 Order.

A separate provision of the temporary orders stated that Father, Mother, and Stepmother could "require the other party or their spouse to take a Random Drug Test," and that in the event of a positive test result, the requesting party "shall be entitled to file a Motion for Additional Temporary Orders." The October 2, 2012 order, however, included a provision modifying this drug testing provision. Rather than allowing Father, Mother, and Stepmother to require a party to submit to a random drug test as previously ordered, the 2012 Order modified the drug testing provision and ordered Mother to submit to drug testing by a specific date, and in the event of a positive test result, Mother's visitation with H.C.C. would remain supervised.

Father further contends that a lack of finality of the October 2012 Order is demonstrated by two vague or ambiguous provisions. Specifically, Father argues that the provision ordering that Mother's visitation would remain supervised in the event of a positive drug test indicates a lack of finality because it does not explain the terms of such supervision, when the supervision will begin, when the supervision ends, and who is to supervise Mother's access to H.C.C. According to Father, the "the open ended wording of the provision demonstrates that the October 2012 Agreed Order is not a final but is instead, a temporary order." Father also argues that

the October 2012 Order did not discharge the court-appointed amicus attorney and stated that the amicus attorney's fees will be split equally, leaving open the question as to whether the amicus attorney's fees to be paid were for his work up to that point in time or whether it was final payment because the amicus attorney's work was complete. Any arguable ambiguity with regard to the terms of the order, however, does not necessarily render the order interlocutory. *See Salazar v. Salazar*, No. 03-13-00385-CV, 2015 WL 307401, at *3 (Tex. App.—Austin Jan. 23, 2015, pet. denied) (mem. op.) (rejecting argument that handwritten additions render divorce decree too vague to be considered final judgment, and holding decree was final judgment); *see generally Lohmann v. Lohmann*, No. 08–99–00115–CV, 2001 WL 1515863, at *9 (Tex. App.—El Paso Nov. 29, 2001, no pet.) (not designated for publication) ("Any void-for-vagueness argument concerning the divorce decree could have been raised in a direct appeal, a motion for new trial, or a bill of review.").

Aside from disposing of all of the parties and claims in the modification suit, the October 2012 Order also contains other indicia of finality. In particular, the order does not indicate that any future hearings or additional proceedings in the case were contemplated when the order was signed. The order, which is described as a "final order" in the document itself, also discharges the parties from their discovery retention responsibilities under the Texas Rules of Civil Procedure, which is consistent with the rendition of a final order.

After considering the relevant pleadings, the May 2012 temporary orders, the parties' conduct, and the order itself, we conclude that the October 2012 Order was a final and appealable order because the record and the order reflect that the trial court intended to dispose of any claims in the 2012 modification suit not expressly identified in the order. *See Rogers*, 455 S.W.3d at 164 (citing *Lehmann*, 39 S.W.3d at 205–06).

The record reflects that Father's October 27, 2014 jury request, which was the only request filed in the current modification suit filed in 2013, was untimely because it was filed less than thirty days before the trial began on November 12, 2014. *See* TEX. R. CIV. P. 216. Therefore, the trial court did not abuse its discretion by denying Father's request for a jury trial.

We overrule Father's first issue.

Denial of Motion for New Trial Based on Incomplete and Inaccurate Reporter's Record

In his second issue, Father argues that he is entitled to a new trial because the court's electronic recording system was defective resulting in a reporter's record containing numerous inaudible words which denied him a complete and accurate record for appeal. Specifically, Father argues that the transcript of Dr. Petzold's testimony is incomplete and ambiguous due to a substantial number of inaudible words. He also argues, without citation to any specific question or answer, that the trial court abused its discretion by denying his motion for a new trial on the basis of

an incomplete record because the trial court relied on Dr. Petzold's testimony in deciding conservatorship and which party was responsible for paying the amicus attorney's fees. Father further contends that he "is unable to demonstrate that the evidence was legally and factually insufficient to support the judgment of the trial court in ordering a change of custody" without a complete and accurate record. Because Father does not identify which inaudible portions of the record he is complaining about or explain how these inaudible portions have prevented him from adequately presenting his appeal, we hold that he has waived his second issue due to inadequate briefing. *See* TEX. R. APP. P. 38.1(i); *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994).

We overrule Father's second issue.

Modification of Prior Conservatorship Order

In his third through sixteenth issues, Father argues that the trial court abused its discretion by ordering a modification of the prior conservatorship order and by making specific fact findings supporting the modification order.

A. Standard of Review

The trial court may change possession of and access to a child if the circumstances of the child, conservator, or other party have materially and substantially changed since the court entered the final prior order and if the change is in the child's best interest. *See* TEX. FAM. CODE ANN. § 156.101(a) (West 2014).

The party that wants the custody changed bears the burden to establish that both a material and substantial change in circumstances occurred and that the change is in the child's best interest. *Zeifman v. Michels*, 212 S.W.3d 582, 589 (Tex. App.—Austin 2006, pet. denied).

In deciding whether a material and substantial change of circumstances has occurred, a fact finder is not confined to rigid or definite guidelines; instead, the determination is fact specific and must be made according to the circumstances as they arise. *See Arredondo v. Betancourt*, 383 S.W.3d 730, 734–35 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Material changes may include a managing conservator's course of conduct that hampers a child's opportunity to favorably associate with the other parent. *See id.* at 735. A material and substantial change in circumstances may be established by either direct or circumstantial evidence. *In re A.L.E.*, 279 S.W.3d 424, 429 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

"The best interest of the child shall always be the primary consideration of the court in determining issues of conservatorship and possession of and access to the child." TEX. FAM. CODE ANN. § 153.002 (West 2014). Courts may consider the following non-exclusive factors when deciding the best interest of the child for purposes of conservatorship: the desires of the child, present and future physical emotional needs of the child, present and future physical and emotional danger to the child, parental abilities of the people seeking custody, stability of home or

proposed placement, and acts or omissions of the parent that may indicate that an inappropriate parent-child relationship. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *see also* TEX. FAM. CODE ANN. § 263.307(b) (West Supp. 2017).

In determining the issues of conservatorship and possession of a child, the trial court is given wide latitude in determining the best interest of the child and the court's judgment will be reversed only if it appears from the record as a whole that the trial court abused its discretion. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982).

The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable. *Worford*, 801 S.W.2d at 109. We view the evidence in the light most favorable to the trial court's decision and indulge every legal presumption in favor of its judgment. *Holley v. Holley*, 864 S.W.2d 703, 706 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

When some substantive evidence supports the trial court's decision, there is no abuse of discretion, and the trial court's decision will be upheld. *See In re S.N.Z.*, 421 S.W.3d 899, 908 (Tex. App.—Dallas 2014, pet. denied); *see also Holley*, 864 S.W.2d at 706.

Under an abuse of discretion standard in family law cases, legal and factual sufficiency challenges do not constitute independent grounds for asserting error, but

are relevant factors in assessing whether the trial court abused its discretion. *See Moore v. Moore*, 383 S.W.3d 190, 198 (Tex. App.—Dallas 2012, pet. denied); *Niskar v. Niskar*, 136 S.W.3d 749, 753 (Tex. App.—Dallas 2004, no pet.). In determining whether there has been an abuse of discretion because the evidence is legally or factually insufficient to support the trial court's decision, we consider whether the trial court had sufficient information upon which to exercise its discretion and whether it erred in its application of that discretion. *Syed v. Masihuddin*, 521 S.W.3d 840, 847–48 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *In re M.M.M.*, 307 S.W.3d 846, 849 (Tex. App.—Fort Worth 2010, no pet.).

The trial court is in a better position having faced the parties and their witnesses, observed their demeanor, and had the opportunity to evaluate the claims made by each parent. *See In re S.N.Z.*, 421 S.W.3d at 909; *Coleman v. Coleman*, 109 S.W.3d 108, 111 (Tex. App.—Austin 2003, no pet.). "We remain 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 at 427 (quoting *Niskar*, 136 S.W.3d at 753). "We cannot weigh witness credibility issues that depend on the appearance and demeanor of the witnesses, for that is the factfinder's province." *In re A.B.*, 412 S.W.3d 588, 592 (Tex. App.—Fort Worth 2013), *aff'd*, 437 S.W.3d 498 (Tex. 2014) (citing *In re J.P.B.*, 180 S.W.3d 570, 573–74 (Tex.

2005)). We defer to the fact finder's determinations as long as they are not unreasonable. *In re A.B.*, 412 S.W.3d at 592.

When the testimony of witnesses is conflicting, we will not disturb the credibility determinations made by the fact finder, and we will presume that it resolved any conflict in favor of the verdict. *See Syed*, 521 S.W.3d at 848; *see also Coleman*, 109 S.W.3d at 111.

B. Analysis

1. Material and Substantial Change in Circumstances

In his third issue, Father argues that the trial court abused its discretion by finding that there was a material and substantial change since the rendition of the prior order because Mother did not offer any evidence of the circumstances that existed when the 2009 divorce decree was rendered.

In its Findings of Fact and Conclusions of Law, the trial court found that "[d]uring the pendency of this suit and the prior modification suit, the mother's possession and access to the child was disrupted and restricted, to allow the father's allegations against the mother to be investigated." The trial court also found that "[w]ithin a very short period of time [after the rendition of the October 2012 Order] the father filed pleadings requesting termination of the mother's parental rights. As a direct result of those pleadings the mother's access was supervised for over a year. The allegations and pleadings were found to be without merit by both the court and

Children's Protective services. The CPS records do not corroborate the allegations of physical and sexual abuse made by the father."

With regard to Mother's extended supervised visitation period, the trial court found that "Dr. Petzold was not able to complete the evaluation because she did not have sufficient time with the father. . . . [T]he Court finds that his efforts were insufficient, which thwarted the efforts of the parties to have his allegations investigated by [the] Court-appointed expert." The court also found that "Dr. Petzold was unable to provide an opinion concerning the father's allegations of sexual abuse because the father did not make sufficient effort to provide Dr. Petzold the information she needed." The trial court also found that "[t]here was a material and substantial change of circumstances since the date of the rendition of the prior order, including but not limited to the father's actions to limit or hamper the relationship between the mother and the child."

Although Father's arguments are based on his position that the 2009 divorce decree was the prior final conservatorship order, we will analyze these issues based on our holding that the October 2012 Order was a final order in the prior 2012 modification suit. Because the October 2012 Order was a final order in the prior 2012 modification suit, it was not necessary for Mother to offer evidence of the conditions that existed in November 2009, as Father argues on appeal. Rather, Mother was required to demonstrate that there had been a material and substantial

change in circumstances since October 2, 2012. A material and substantial change in circumstances may be established by either direct or circumstantial evidence. *In re A.L.E.*, 279 S.W.3d at 429 ("Even in the absence of *direct* evidence of the conditions [when the prior custody order was rendered], the record clearly shows that the facts that are relied upon as showing a material change in circumstances . . . occurred after the earlier custody order.").

Father filed four CPS complaints against Mother after the rendition of the October 2012 Order, and the record reflects that CPS did not find that there was a reason to believe any of Father's post-October 2, 2012 allegations of abuse. These complaints were filed in conjunction with several post-October 2, 2012 pleadings in which Father sought to either terminate Mother's parental rights or limit her access to H.C.C., and he received temporary restraining orders against Mother, based in part on the same abuse allegations that CPS determined were unmeritorious.

Despite CPS's concerns that repeated questioning of H.C.C. and constant prompting for an outcry of abuse or neglect by Mother "could lead to coaching and a false outcry of abuse or neglect in the future," H.C.C. was repeatedly questioned about allegations of abuse by his family, a CPS caseworker, and other medical professionals, including Father's two experts, due, at least in part, to Father's post-October 2, 2012 pleadings and CPS complaints. The record also reflects that H.C.C. did not make an outcry of abuse to his caseworker, his elementary school principal,

his pediatrician, or anyone other than Father, Stepmother, Father's mother, and Father's experts, Sullivan and Dr. Rosenstock, and that Dr. Rosenstock was the only expert who concluded that H.C.C. had been abused after October 2, 2012.[4]

In addition to Father's numerous petitions and CPS complaints filed after the October 2012 Order, the record also reflects that Mother testified that there had been a material and substantial change of circumstances that began when she was served with Father's February 2013 petition and placed on supervised visitation at the end of that month. It is also undisputed that Mother remained on supervised visitation until June 2014. According to Mother, her relationship with H.C.C. changed as a result of her extended supervised visitation that began in February 2013. She further testified that the lengthy supervised visitation period was difficult on H.C.C. and he would become upset and stall every time he had to leave her. [3 RR 82-83] Although Mother had been on supervised visitation before the October 2012 order, she had never had her access restricted for such an extended duration.

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[4] Father argues that two other medical doctors concluded that Mother had physically abused H.C.C.—Dr. Noble, and Dr. Isaac Reena. Dr. Noble suspected that H.C.C. had been abused during CPS's investigation of Father's March 2012 allegations. Dr. Reena, the physician who evaluated H.C.C. at the Children's Assessment Center during CPS's investigation of Father's November 2012 allegations, noted in his report that based on information provided in CPS's referral report and by Stepmother, he was concerned that any inappropriate situations and contact with Mother may interfere with H.C.C.'s psycho-sexual development and boundaries and perceptions of others, especially adult females. He did not, however, make a finding that any such abuse had occurred.

Father argues that he is not responsible for Mother's extended supervised visitation period because Mother voluntarily agreed to be placed on supervised visitation in February 2013, and she never sought relief from that agreement. Mother, however, testified that she agreed to be placed on supervised visitation after Father filed his February 2013 petition because she did not want H.C.C. in foster care. Mother also testified that Father did not sufficiently participate in the evaluation and that he unnecessarily dragged out that process, resulting in her being on supervised visitation for over a year.

The record also reflects that Mother met with the court-appointed expert, Dr. Petzold, seven or eight times beginning on May 22, 2013, and provided her with documentation, whereas Father only went to Dr. Petzold's office twice—once on July 11, 2013 and once the following spring—and he provided her with no documentation. Although Mother testified that Dr. Petzold told her that Father was not attending his required appointments, Dr. Petzold did not recall having any such conversation with Mother. Father testified that he met with Dr. Petzold once, took a test for Dr. Petzold, and that he understood that he would need to meet with Dr. Petzold for further sessions, but she never contacted him to schedule any additional appointments. In the face of this conflicting testimony, the trial court was in the best position to evaluate the credibility of the witnesses and resolve any conflicts in their

testimony. *See Coleman*, 109 S.W.3d at 111. We presume that the court resolved any conflict in favor of the verdict. *See id.*; *see also Syed*, 521 S.W.3d at 848.

In light of the record as a whole, we conclude that there is some substantive evidence that Father limited or hampered H.C.C.'s relationship with Mother and that his conduct caused her to be on supervised visitation for nearly a year and a half. In light of this substantive evidence, we conclude that the trial court had sufficient information upon which to exercise its discretion and that it did not abuse its discretion by finding that there was a material and substantial change in circumstances after the rendition of the October 2012 Order. *See Syed*, 521 S.W.3d at 847–48; *see also In re M.M.M.*, 307 S.W.3d at 849.

We overrule Father's third issue.

2. Best Interest

In his seventh issue, Father argues that the trial court abused its discretion by finding that it was in H.C.C.'s best interest to continue with joint managing conservatorship and give Mother the right to designate the child's primary residence.

The record reflects that, at the time of trial, H.C.C. was seven years old and had primarily resided with Father since he was nine months old. Mother and Father divorced in 2009 when H.C.C. was a toddler. Father and Stepmother married in 2011. They had a daughter together and Stepmother has a son from a previous relationship. According to Father, H.C.C. has a loving relationship with Stepmother

and both of his step-siblings. Father describes H.C.C. as a happy child who is doing well in school. Father also frequently attends school functions at H.C.C.'s elementary school, and accompanies his son on school field trips. Father has been continuously employed since H.C.C.'s birth and he has provided for most of the child's financial and medical needs. Father testified that a change of conservatorship would be emotionally devastating to H.C.C. because Father's home is the only home the boy has ever known.

The record also reflects, however, that Father was arrested for assaulting Stepmother a few months before the 2014 trial, and that Father moved out of his family home for approximately two months. He and Stepmother reconciled and the assault charge was dismissed prior to trial.

Mother, who is employed part-time and attends college part-time, has lived with her mother and stepfather in their home since 2008. She testified that she and H.C.C. would live there if she was awarded the right to decide his primary residence. According to Mother, H.C.C. "loves [his maternal grandparents] with all of his heart" and he "has a very good relationship with" them. Mother's mother testified that she was "very involved" in H.C.C.'s life when the October 2012 Order was issued, and that H.C.C. has a close relationship with her and her husband, H.C.C.'s step-grandfather.

Mother, who lives two hours away from H.C.C.'s elementary school, is not as actively involved in H.C.C.'s school activities as Father. She has, however, spoken to H.C.C.'s teacher about his performance in school, she knows his homework schedule, and she tries to attend school functions when she is not working. Mother also receives some financial support from her mother and her mother would continue to help her financially. Mother, however, has not paid her share of H.C.C.'s medical expenses, and, although a portion of her child support obligations are taken out of her paycheck, Mother was over $4,400 behind in child support payments to Father at the time of trial.

After Father contacted CPS in March 2012 to accuse Mother of abusing H.C.C., Dr. Noble reviewed the case at CPS's request, including the photographs Father took of H.C.C., and, based on his review of the file, he "strongly suspect[ed] physical abuse." CPS noted in its records of that investigation that "[d]ue to the evidence of physical abuse between the mother and [H.C.C.], the mother could be considered an inappropriate caregiver." This investigation resulted in a finding that there was a reason to believe that Mother had physically abused H.C.C. The physical abuse, which consists of a scratch on the boy's eyelid and grab marks on his arms, occurred while H.C.C. was staying in Mother's home and under her care.

Although the CPS caseworker investigating Father's March 2012 allegation of abuse was concerned about Mother's caregiving abilities in light of the physical

abuse finding, the caseworker was also concerned about Father's and Stepmother's conduct. Specifically, the caseworker noted that Father and Stepmother were "on the verge of emotionally abusing" H.C.C. due to their repeated questioning of the boy and "constantly prompting him for an outcry of abuse or neglect." She also noted that "step-mother has interviewed the child several times and has asked leading questions with regards to abuse or neglect," and that "there is an imbalance of power between the father and the step-mother which in the future may affect [Father's] ability to protect his children in cases of possible emotional abuse." She also noted that Father had "unrealistic expectations of the child when it comes to disclosing abuse or neglect or being able to recall bruises," and that Father's and Stepmother's actions "could lead to coaching and a false outcry of abuse or neglect in the future." The caseworker also noted that H.C.C. "appears to have closed himself off at this point due to being interviewed several times by the father, step-mother, investigator, medical professionals, and therapist."

The record reflects that all of H.C.C.'s caregivers—Mother, Father, and Stepmother—were ordered to attend parenting classes as a result of CPS's March 2012 investigation. Mother also attended an anger management class.

Although CPS found that there was a reason to believe that Mother had physically abused H.C.C. during that case, Father's subsequent CPS cases in February and April 2013, and September 2014 were all found to be without merit.

Specifically, Father's November 2012 case was thoroughly investigated by CPS, who interviewed H.C.C., Mother, Father, Stepmother, Sullivan, and others, and sent H.C.C. to be evaluated by the CAC. Based on its investigation, CPS notified the parties that it had "ruled out" Father's allegations of abuse. CPS also found Father's February and April 2013 cases to be meritless and closed those cases within a matter of days. CPS also closed Father's September 2014 case because the agency found that it "[d]oesn't appear to involve abuse, neglect, or risk." CPS never found that there was a reason to believe that Mother sexually abused H.C.C.

Despite CPS's concerns that repeated questioning of H.C.C. was affecting the child's well-being, H.C.C. continued to be repeatedly questioned by his family, CPS, and various medical professionals about allegations of abuse raised in Father's four subsequent complaints to CPS—none of which resulted in a finding of abuse by CPS.

The CPS caseworker who investigated Father's March 2012 complaint noted that both Father and Mother had a history of drug use and that neither Mother nor Father had been forthcoming during that investigation. After he was questioned a second time, Father admitted that he had used marijuana in 2007 and had used cocaine twice with Mother. Mother admitted that she had lost custody of H.C.C. when he was an infant because she had breastfed him while using cocaine. She claimed that she had sought treatment and had been sober since 2008. Although

Mother was arrested for possession of morphine in 2010 and pleaded guilty to the charge, there is no evidence in the record that she was using drugs during that time.[5] Mother's March 2012 drug test was negative. There is also no evidence in the record indicating that either Mother or Father took any drug tests after March 2012. In addition to Mother's criminal record, the record also reflects that Father was arrested for assaulting Stepmother a few months prior to the November 2014 trial, but the two reconciled and the assault charge was dismissed prior to trial.

In light of the record as a whole, we conclude that there is some substantive evidence that supports the trial court's findings that it was in H.C.C.'s best interest to continue with joint managing conservatorship and give Mother the right to designate the child's primary residence. In light of this substantive evidence, we conclude that the trial court had sufficient information upon which to exercise its discretion and that it did not abuse its discretion by finding that its changes to conservatorship were in H.C.C.'s best interest. *See Syed*, 521 S.W.3d at 847–48; *see also In re M.M.M.*, 307 S.W.3d at 849.

We overrule Father's seventh issue.

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5 CPS's records reflect that Mother was also arrested for evading arrest in conjunction with the drug possession charge.

Additional Fact Findings

In his fourth through sixth and eighth through sixteenth issues, Father challenges the sufficiency of the evidence supporting several of the trial court's findings of fact which support the court's findings that a material and substantial change occurred, that the modification order is in H.C.C.'s best interest, or both.

We have concluded that the trial court's findings that a material and substantial change occurred after the rendition of the October 2012 order and that the modification order is in H.C.C.'s best interest are supported by sufficient evidence, and that the trial court's findings did not constitute an abuse of discretion. Therefore, we need not analyze every one of the remaining findings of fact. *See generally Syed*, 521 S.W.3d at 850. We overrule Father's fourth through sixth and eighth through sixteenth issues.

Child Support

In his seventeenth issue, Father argues that the trial court abused its discretion by finding that Father was required to pay Mother $651.00 per month for child support because the evidence supporting the finding is legally and factually insufficient. Specifically, Father argues that the $651.00 child support provision in the trial court's final order amounts to an abuse of discretion because it conflicts with the trial court's pronouncement in court and its Findings of Fact and Conclusions of Law that his child support was calculated to be $516.00 per month.

Mother does not challenge this point and agrees that the judgment should be corrected to reflect the lower figure if the record supports Father's position.

Having reviewed the record, we modify the judgment to reflect that Father is obligated to pay $516.00 per month in child support to Mother.

Amicus Attorney's Recommendations

In his eighteenth issue, Father argues that the trial court abused its discretion by requesting and following the amicus attorney's recommendations with regard to conservatorship because there was no evidence, or legally and factually insufficient evidence, to support her recommendations, e.g., parents to remain joint managing conservators with Mother having the exclusive right to designate H.C.C.'s primary residence, and Father given the standard possession order. Neither the trial court's order nor its findings of fact and conclusions of law specifically mention the amicus attorney or her recommendations. It is also not apparent from the trial transcript that the trial judge relied on the amicus attorney's recommendations when it made its decisions. *See generally Coleman*, 109 S.W.3d at 111 (stating trial court, as ultimate fact finder, weighs witness credibility issues and resolves any conflicts in evidence). Furthermore, as previously addressed, the trial court did not abuse its discretion by finding that such modifications of conservatorship were in H.C.C.'s best interest.

We overrule Father's eighteenth issue.

Amicus Attorney's Fees

In his nineteenth issue, Father argues that the trial court abused its discretion by finding that he should pay all of the amicus attorney's fees because the evidence was legally and factually insufficient to warrant assessing such fees against him as a sanction. An appellant's brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities. TEX. R. APP. P. 38.1(i). A failure to provide substantive analysis of an issue or citations to appropriate authority waives the complaint. *See Cervantes–Peterson v. Tex. Dep't of Family & Protective Servs.*, 221 S.W.3d 244, 255 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Father neither identifies the appropriate standard of review for this issue nor cites to any case law regarding awards of amicus attorney's fees in SAPCR cases, or rules or relevant case law regarding the imposition of sanctions in civil cases. Because Father failed to provide us with substantive legal analysis and citations to authority in support of his challenge to the award of amicus attorney's fees against him as a sanction, we hold that he waived this issue due to inadequate briefing. *See* TEX. R. APP. P. 38.1(i); *Fredonia State Bank*, 881 S.W.2d at 284.

We overrule Father's nineteenth issue.

Conclusion

We modify the trial court's order to reflect that Father is required to pay $516.00 per month in child support to Mother, and we affirm the order as modified.

Russell Lloyd
Justice

Panel consists of Justices Higley, Massengale and Lloyd.