Affirmed and Memorandum Opinion filed April 26, 2018.

In The

Fourteenth Court of Appeals

NO. 14-17-00289-CV

IN THE INTEREST OF M.C.K.

On Appeal from the County Court at Law No. 4
Williamson County, Texas
Trial Court Cause No. 11-3113-FC4

MEMORANDUM OPINION

The dispute in this family law case is who should have the right to make educational decisions for the child. Mother was awarded that right exclusively when the child was just a baby. Once the child became school-aged, Father sought to share in that right because he disagreed with Mother's choice of homeschooling.

The issue was tried to the bench, and the trial court sided with Father. The trial court modified the parent-child relationship by granting both Mother and Father the right to make educational decisions for the child. The trial court further ordered that if Mother and Father cannot come to a consensus, then the child must attend public school.

Mother now appeals from the trial court's order, arguing that the order does not conform to the pleadings and that the evidence is insufficient to support a modification. For the reasons explained below, we overrule Mother's arguments and affirm the trial court's order.

THE PLEADINGS

To understand Mother's complaint about the pleadings, we must first explain the procedural history of this case, which is somewhat lengthy.

Shortly after the child was born, the Attorney General's Office initiated an action to establish the parent-child relationship. In that action, the trial court determined that Mother and Father were the child's parents, and the court named both of them joint managing conservators, with Mother receiving the exclusive rights to determine the child's residence and to decide matters relating to the child's education. At the time of the order establishing the parent-child relationship, the child was approximately nine months old.

That original order was modified at Mother's request when the child was approximately fifteen months old. The modification only addressed the terms of Father's possession and access.

When the child was one month shy of her fourth birthday, Father filed a motion to enforce the modified order, alleging that Mother had refused to surrender the child for Father's scheduled period of summer visitation. Father asked for make-up visitation and that Mother be held in contempt, jailed, and fined. He did not request any modification of the education right.

Mother responded with a petition to modify the parent-child relationship. She alleged that circumstances had materially and substantially changed because the child had returned home from visitation with genital bruising, and because Father

had recently been charged with the sexual assault of an unrelated adult woman. Mother requested the trial court to appoint an amicus attorney for the child and to order supervised visitation for Father.

As the child was approaching her fifth birthday, the parties attended mediation, with an amicus attorney in attendance. Several issues were addressed in the mediation that had not previously been pleaded. All of the issues were resolved in a mediated settlement agreement, with the exception of four issues, which the parties expressly reserved for trial. Those issues were whether Father should be subject to random alcohol testing, whether Father owed any outstanding uninsured medical expenses, whether Father was entitled to make-up visitation, and whether the child should be homeschooled.

Mother requested, and the trial court granted, an interim order that incorporated the terms of the MSA. The interim order was issued one month before the school year was set to begin, and in it the trial court clarified that Mother has "the exclusive right to make decisions concerning the child's education as contained in the prior order, unless modified at final trial."

The trial was set a few months into the new school year, not long after the child had turned five. On the morning of trial, Mother objected to trying the education issue because Father had no pleadings on file requesting a modification of the education right. Father responded that he and Mother had reserved that issue for trial in the MSA. Father also explained that, if necessary, he would move for a continuance to file an amended pleading. The amicus attorney recommended that the education issue should be tried because all parties were on notice of that issue after the MSA was entered.

The trial court agreed with Mother that there was a defect in the pleadings, but the court also suggested that a continuance would not be in the best interest of

the child. Recognizing further, however, that Mother had recently retained a new attorney who might not be prepared to try the education issue, the trial court presented Mother with an option: either try the education issue that day; or reset the hearing for another date, allowing Mother's attorney more time to prepare, if necessary, and giving Father an opportunity to cure the defect in the pleadings.

The trial court recessed the hearing for Mother to consult with her attorney, and after the recess, Mother's attorney proposed a conference in chambers, with just the lawyers and the judge. All parties assented to the chambers conference, and when it ended, the attorneys announced a tentative agreement regarding the four issues that the parties had reserved for trial. On the education issue, the tentative agreement called for the child to continue to be homeschooled, but only through kindergarten.

After the tentative agreement was announced, Father's attorney indicated that there may have been a misunderstanding about the year in which the child was scheduled to finish kindergarten. The trial court recessed the hearing again for the attorneys to confer with their clients. At the end of the recess, the trial court was advised that Mother and Father could not agree on the education issue, which would need to be tried.

When the trial court called for the first witness, Mother objected once more that Father had no pleadings on file requesting a modification of the education right. Father then orally moved for a trial amendment, pointing out that Mother could not assert that she was surprised by the unpleaded education issue, given that it was addressed in the interim order that Mother herself had requested.

Mother replied that her concern was for the burden of proof, not the element of surprise, for which she conceded there was none. Mother explained that, by filing her own petition to modify, she had already made a judicial admission of a material and substantial change. But Mother insisted that her judicial admission related to

issues other than the education issue, and Mother argued that Father should still be held to his burden of proving the necessary change concerning the education issue.

The trial court granted Father's trial amendment. The court also explained that it would not construe Mother's petition to modify as a judicial admission that relieved Father of his separate burden of proof. The court then heard from two witnesses, Mother and Father, and after considering their testimony, the court determined that the child should attend public school unless the parents could agree otherwise.

Mother now argues in our court that the trial court's order does not conform to the pleadings because Father had no pleadings on file and because Mother did not consent to trying the unpleaded education issue. Mother also argues that Father's oral trial amendment was ineffective because Father had no pleadings to amend and, in any event, the trial amendment was never reduced to writing.

We begin by addressing Mother's argument that Father had no pleadings on file.

Mother correctly observes that Father never filed a written petition to modify the parent-child relationship, but that omission is not dispositive. Father filed a written motion for enforcement, and in the family law context, this motion is considered a pleading. *See In re Silverman*, No. 03-09-00074-CV, 2009 WL 1099197, at *2 (Tex. App.—Austin Apr. 24, 2009, orig. proceeding) (mem. op.) (identifying a Petition for Enforcement and Contempt as a pleading); *see also Yasin v. Yasin*, No. 03-10-00774-CV, 2011 WL 5009895, at *5 (Tex. App.—Austin Oct. 21, 2011, no pet.) (mem. op.) ("Texas courts have traditionally maintained liberal pleading requirements in family law cases.").[1] And like any pleading, Father's

[1] The Supreme Court of Texas transferred this case from the Third Court of Appeals to this court. In cases transferred by the high court from one court of appeals to another, the transferee

motion for enforcement was capable of amendment. *See In re D.B.J.*, 459 S.W.3d 169, 170 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (identifying the second amended motion for enforcement as "the live pleading at the time of judgment").

Father amended his pleading at trial, as he was permitted to do by Rule 66. That rule provides that a trial court must freely allow for a trial amendment "when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice [her] in maintaining [her] action or defense upon the merits." *See* Tex. R. Civ. P. 66.

Father established good cause for his trial amendment: the parties had previously agreed during mediation that the unpleaded education issue would be reserved for trial on the merits. Mother conceded that there was no surprise with the education issue. Her sole concern was whether Father would have the burden of proving a substantial and material change, and the trial court assured Mother that the burden would still be his. Mother did not establish any reason the amendment would cause prejudice.

Despite Rule 66, Mother suggests that Father could not have amended his pleading (i.e., his motion for enforcement) to include a request on the education issue because, by the time of his trial amendment, all issues in that pleading had already been resolved. This argument is unpersuasive for at least two reasons. First, at the time of Father's trial amendment, the trial court had not rendered a judgment, which meant that the issues had not been finally resolved. Second, Rule 66 specifically allows for a party to bring omissions in a pleading to the attention of the court, and

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court must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court. *See* Tex. R. App. P. 41.3.

here, Father asserted that the education issue had been omitted and was still in need of resolution.

Mother also likens this case to *In re C.L.C.*, No. 04-11-00920-CV, 2013 WL 1149270 (Tex. App.—San Antonio Mar. 20, 2013, no pet.) (mem. op.), which held that a trial court did not abuse its discretion by refusing a trial amendment after the party requesting the amendment had nonsuited his claims. *Id.* at *5. Mother appears to suggest that, under *C.L.C.*, a party cannot request a trial amendment if he has no live pleadings. Assuming for the sake of argument that this rule were true, it would not apply to our facts because, unlike the complaining party in *C.L.C.*, Father had a live pleading, which he never nonsuited.

In one last point, Mother argues that Father's trial amendment was ineffective because it was never reduced to writing. Mother correctly observes that a trial amendment must be filed as a written pleading. *See* Tex. R. Civ. P. 67. If a trial court accepts a trial amendment in oral rather than written form, the pleading is defective, but the opposing party can waive that defect by failing to object. *See City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 73 (Tex. 2000). Here, Mother did not object in the trial court that Father's trial amendment was oral rather than written. Accordingly, Mother waived any complaint that the trial amendment was not in written form.

We conclude that Father had a pleading, which he orally amended at trial without objection to include a request to modify the education right. We further conclude that the trial court rendered a judgment that conformed to Father's amended pleading. We overrule Mother's arguments to the contrary.

THE MERITS

Mother argues next that the trial court abused its discretion by modifying the parent-child relationship because the evidence is legally and factually insufficient to support a modification.

I. Standards of Review

Because the standards for sufficiency of the evidence and abuse of discretion often overlap in family law cases, appellate courts employ a hybrid analysis. *See Echols v. Olivarez*, 85 S.W.3d 475, 477 (Tex. App.—Austin 2002, no pet.). Under the overarching standard, the question of conservatorship is left to the sound discretion of the trial court when it sits as trier of fact. *Id*. The trial court is in the best position to observe the demeanor and personalities of the witnesses and can "feel" the forces, powers, and influences that cannot be discerned by merely reading the record. *Id.*

Within this overarching standard, we engage in a two-pronged inquiry to determine whether the trial court (1) had sufficient information on which to exercise its discretion, and (2) erred in its application of discretion. *See In re A.A.M.*, No. 14-05-00740-CV, 2007 WL 1558701, at *3 (Tex. App.—Houston [14th Dist.] May 31, 2007, no pet.) (mem. op.). The traditional sufficiency review comes into play with regard to the first question, and those standards are discussed *infra*. *Id.* As for the second question, we determine whether, based on the admitted evidence, the trial court made a reasonable decision. *Id.* Stated inversely, we must conclude that the trial court's decision was neither arbitrary nor unreasonable. *Id.* Thus, we resolve the second question by determining whether the trial court's findings constitute an abuse of discretion. *Id.*

Because our inquiry both begins and ends with the abuse of discretion standard, we begin by describing this standard of review, and then discuss the legal and factual sufficiency standards of review that pertain to the question of whether the trial court had sufficient information on which to exercise its discretion. We then set forth the law governing the modification at issue before analyzing the evidence and Mother's arguments.

Abuse of Discretion. A trial court's order modifying the parent-child relationship will not be disturbed on appeal unless the complaining party can show a clear abuse of discretion. *See Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982). The test for abuse of discretion is whether the trial court acted in an arbitrary and unreasonable manner, or whether it acted without reference to guiding rules or principles. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985). An abuse of discretion does not occur as long as some evidence of a substantive and probative character exists to support the trial court's decision. *Id.* at 241–42. The fact that a trial court may decide a matter within its discretionary authority in a different manner from an appellate court in a similar circumstance does not demonstrate an abuse of discretion. *Id.*

Legal Sufficiency. Because Mother attacks the legal sufficiency of an adverse finding on an issue on which she did not have the burden of proof, she must demonstrate on appeal that there is no evidence to support the adverse finding. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). The evidence is legally insufficient only if the record discloses a complete absence of evidence of a vital fact, the court is barred by rules of law or of evidence from giving weight to the only evidence offered to support a vital fact, the evidence offered to prove a vital fact is no more than a mere scintilla, or the evidence conclusively establishes the opposite of a vital fact. *See Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334

(Tex. 1998). In determining whether there is legally sufficient evidence to support the trial court's exercise of discretion, we consider evidence and inferences favorable to the finding if a reasonable factfinder could, and disregard evidence contrary to the finding unless a reasonable factfinder could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 828 (Tex. 2005).

Factual Sufficiency. In analyzing a challenge to the factual sufficiency of the evidence, we examine the entire record to determine if the trial court's finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002). We consider and weigh all of the evidence in a factual-sufficiency review, not just the evidence in support of the judgment. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam).

Governing Law. To modify an order that provides for the appointment of a conservator of a child, the trial court must find that the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed, and that a modification would be in the best interest of the child. *See* Tex. Fam. Code § 156.101.

In determining whether a material and substantial change has occurred, the trial court is not confined to rigid or definite guidelines. *See In re A.L.E.*, 279 S.W.3d 424, 428 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Instead, the court's determination is fact-specific and must be made according to the circumstances as they arise. *Id.*

The court's best-interest determination is also fact-specific and may be guided by such nonexclusive factors as (1) the desires of the child; (2) the needs of the child now and in the future; (3) the danger to the child now and in the future; (4) the parental abilities of the individuals seeking a modification; (5) the programs

available to assist these individuals to promote the best interest of the child; (6) the plans for the child by these individuals; (7) the stability of the home; (8) the acts or omissions of the parent, which may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *See Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).

II. The Evidence

Mother testified that she opposes public schools because she believes that public schools do not promote critical thinking. In her view, public schools primarily teach children to memorize and regurgitate facts for standardized tests. Mother also explained that she opposes public schools because her family is Jewish and Hebrew is not taught in public schools.

Mother does not have any teaching degrees or certifications, but she taught for one year at a Montessori school, and she has homeschooled her two older children for nearly their entire lives. These other children, ages sixteen and eleven at the time of trial, have no biological relationship to Father.

Mother testified that she does not follow a specific curriculum in her homeschooling. Instead, she shops for different textbooks on eBay, at a teacher supply store near her home, and at secondhand stores like Half Price Books. Mother assigns work based on the textbooks that she favors. While her children are doing these assignments, Mother is working as a subcontractor for an online company that offers work-from-home employment opportunities.

Father testified that the child was six months old when the Attorney General's Office initiated its action, and nine months old when the trial court entered its order establishing the parent-child relationship. Father was not represented by counsel at the time of the original order, and because the child was just an infant at that time,

Father said that the child's education had not been discussed in depth. Father opined that, because the child is now school-aged, there has been a change in circumstances.

Father also expressed concern that the child is being "isolated" in her homeschooling environment. He indicated that the child has never attended a birthday party or had play dates with other children. Even though Mother asserted that the child plays with other children in the community on a daily basis, Mother could not name a single friend that the child has. Mother also admitted that the child has never been to a birthday party for another five-year-old.

Father expressed additional concern that the child is not "being taught on a correct curriculum track." Father said that when he asks the child about what she is learning, the child will "clam up" and not say anything.

III. Analysis

Based on the foregoing, we conclude that there is legally and factually sufficient evidence to support the trial court's implied finding of a material and substantial change in circumstances. The evidence established that, when the education right was first assigned to Mother in the original order, the parties had not yet formed a detailed plan for the child's education because the child was still an infant. By the time of trial on Father's petition to modify, the child was school-aged and Mother had begun to homeschool her. The trial court could have reasonably concluded that the child's educational needs had changed in those intervening years. *Cf. Trammell v. Trammell*, 485 S.W.3d 571, 579 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (holding that the trial court did not abuse its discretion by modifying the parent-child relationship so that both parents shared in the education right where the youngest child was not in school at the time of the previous order and where the father's ability to pay for private school education had since changed).

Citing *Zeifman v. Michels*, 212 S.W.3d 582 (Tex. App.—Austin 2006, pet. denied), Mother contends that the trial court should not have found a change in circumstances. As in our case, *Zeifman* also involved a dispute over the education right. The mother in *Zeifman* moved for a modification so that she could enroll the child in private school. *Id.* at 586. The father opposed the modification because the child was thriving in public school, and because the parents had already agreed that the child would attend public school. *Id.* at 585–86, 590. At trial, the mother offered the following explanation for a change in circumstances: the child had been accepted into the private school, and since the time of the earlier decree, the child had grown from a toddler into a seven-year-old. *Id.* at 594. The trial court granted the modification, but the court of appeals reversed, holding that the evidence was legally insufficient to support a finding of a material and substantial change. *Id.* at 596.

Mother contends that *Zeifman* is controlling because, in both cases, the child was too young to begin school at the time of the original order and school-aged at the time of the modification request. Based on that similar change in age, Mother contends that the trial court could not modify the parent-child relationship so that Father could share in the education right.

Mother's argument overlooks at least two important factors that separate these two cases.

First, in *Zeifman*, the parents planned for the education of the child, and their plan was incorporated into the terms of the divorce decree. *Id.* at 585–86. The plan was very specific, identifying by name the pre-K and public school programs that the child should attend, in order of priority. *Id.* The plan even provided a mechanism for dispute resolution should disagreements arise as the child progressed in her education. *Id.*

By contrast, there is no similar evidence that Mother and Father had planned for the education of the child. The original order is silent as to whether the child would be taught at home, at public school, or at some other institution. The order merely declares that Mother has the exclusive right to make educational decisions for the child.

Second, the "undisputed evidence" in *Zeifman* established that the child was doing "very well academically and socially" at her public school, and that "her academic and social needs were being met." *Id.* at 594. The appellate court concluded that evidence that the child might do better at a private school was speculative, and therefore, not sufficient to constitute a material and substantial change. *Id.*

Here, Father presented evidence that the child's educational and social needs were not being met in the homeschooling environment. Father showed that the child would not, or could not, discuss what she was learning. Father also showed that Mother was not adhering to an established curriculum and that her choice of homeschooling was isolating the child socially.

Zeifman stands for the rule that a change in age, by itself, is insufficient to establish a change in circumstances, unless changed needs are also shown. *Id.* at 593 ("Increase in age alone is not a changed circumstance to justify modification unless changed needs are shown."). Applying that rule to our case, the trial court could have reasonably found that the child had educational and social needs at the time of trial that she did not have at the time of the original order. Because the trial court could have further found that those needs were not being met through Mother's choice of homeschooling, we conclude that the trial court did not abuse its discretion by finding a material and substantial change in circumstances.

We also conclude that the evidence is legally and factually sufficient to support the trial court's finding that a modification in the education right is in the best interest of the child. The trial court heard testimony that Mother does not follow an established curriculum, and that the child appears to be lacking in peer relationships. This testimony supports the trial court's implied finding that the best interests of the child would be best served by enrolling the child in public school, where the child can learn under more structured programs, and where the child can socialize with other children her own age. Even though the record shows that Mother has homeschooled two other children without any known problems, the trial court's implied finding is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, we conclude that the trial court did not abuse its discretion by modifying the parent-child relationship.

CONCLUSION

The trial court's order is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Jamison.