Opinion issued September 9, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00660-CV

THOMASINA COLBERT-NOLL, Appellant

V.

ATTORNEY GENERAL OF TEXAS AND KENNETH NOLL, Appellees

On Appeal from the 387th District Court
Fort Bend County, Texas
Trial Court Case No. 15-DCV-227581

MEMORANDUM OPINION

Thomasina Colbert-Noll challenges the trial court's ruling to reduce Kenneth Noll's monthly child-support obligation to an amount below the state's statutory guidelines. She argues that the reduction was an abuse of discretion and that the

court's consideration of irrelevant evidence in evaluating the reduction was another abuse of discretion.

We affirm.

Background

The divorce and child-support orders

Colbert-Noll and Noll were married for many years. They have four children together. Noll also has an older daughter from a previous relationship. The record does not indicate the date of marriage, but the couple divorced in Maryland in 2019, when their children were between the ages of five and fifteen.

Originally, the couple lived in Texas, but, in 2014, Colbert-Noll and the children went to Maryland for an extended visit with Colbert-Noll's mother. The couple then separated, and Colbert-Noll and the children remained in Maryland. They returned to Texas in 2015, but they moved back to Maryland in 2016. They have lived with Colbert-Noll's mother since then. The Maryland court resolved the division of property and the grant of a divorce, but a Texas court resolved child support.

The parties stipulated that the amount of monthly child support under the statutory guidelines, based on Noll's income, would be $1,822. Yet two previous orders set child support at a lower amount based on evidence presented at that time. In 2016, child support was set at $1,313 per month. In 2020, it was increased to

$1,525 per month. Colbert-Noll requested a de novo review of that order. The district judge held a hearing in August 2020. There were two witnesses: Thomasina Colbert-Noll and Kenneth Noll. The trial court issued a third order that set child support at $1,022 per month, which is $800 less than the statutory guidelines. In this appeal, Colbert-Noll challenges the $1,022 child-support amount.

The testimony from Noll and Colbert-Noll at the de novo hearing

Noll testified that he has five children. The four youngest are the subjects of this suit. The oldest lives with her mother. Noll pays child support to both mothers. The oldest will be 18 years old soon.

Noll and Colbert-Noll divorced in April 2019. The last time he visited the children was Thanksgiving 2019. He traveled to Maryland for the visit. He brought with him the woman he would later marry and her two children. The visit went badly. The police were called to the hotel. Noll had taken his four children to the hotel as part of his visitation. One or more of the children communicated with Colbert-Noll about the visit, and Colbert-Noll showed up.

Both parties testified about what led to Colbert-Noll showing up at the hotel, who called the police and why, and what was said and done in front of the children. Their versions of events were very different. But both agree that Colbert-Noll left the hotel with a couple of the children and then Noll refused to let a child left behind back into his hotel room, leading to the police being called a second time.

Noll testified that the Maryland order allows him to visit the children once per month and he wants to have those visits. He requested that his child-support obligation be lowered to off-set the cost of traveling out-of-state to where Colbert-Noll moved with the children.

Colbert-Noll contended that Noll would not use the visits granted to him in the divorce and that the reduction in child support would harm the children because Colbert-Noll's teacher's salary is not enough to support the children. She testified that Noll had not seen the kids since 2019 and was unlikely to exercise all future visits for which he sought a financial off-set for transportation costs.

Noll testified that his lack of visits stemmed from Colbert-Noll's interference with his visitation attempts. Colbert-Noll objected to the line of testimony about past interference with visits, arguing that child support and visitation are not linked. Noll responded that the testimony was relevant to explain why he had infrequent visits in the past yet was testifying that he planned to use all his visits in the future.

Noll argued that the amount of child-support should be lowered to off-set the cost of travel out-of-state to visit the children. He created some charts to show the projected expenses of out-of-state visitation. The charts were admitted into evidence. These charts assumed he would visit the children eight or nine months of the year, and his children would visit him three or four months of the year. For each month, he estimated the cost for airfare, transportation, hotel, food, and other expenses.

Focusing only on the projected airfare expense, Noll estimated that his airfare would be $400 per month when he visited the kids and $1,800 per month when his kids visited him. This averaged $808.33 per month for airfare.

Colbert-Noll pointed out that the chart was created based on Noll's research and experience visiting the children in Maryland, not North Carolina where she had recently moved with the children. Noll responded that he expected that the costs would be about the same for both locations.

Colbert-Noll testified that she and her four children live with her mother. They moved to Maryland in 2014. They returned to Texas in 2015 and moved back to Maryland in 2016. She and Noll discussed reconciling, but then she proceeded with her petition for divorce. The divorce became final in April 2019. According to Colbert-Noll, her mother had long wanted to move to North Carolina to be closer to her siblings. Colbert-Noll agreed to relocate to North Carolina and continue to live with her mother. They moved in June 2020.

Colbert-Noll asked that child support be set at the full amount of the statutory guidelines with adjustments each time one of Noll's children aged out of child support. She testified that her teacher's salary does not provide enough to fully support the children, making child support necessary.

Colbert-Noll emphasized how the divorce had impacted her financially through testimony that the divorce decree allows her to claim at least one child for

tax purposes. Yet when she filed her taxes, she was told that Noll had filed his taxes and claimed all the children for tax benefits. He wants the tax benefit of the children—who live with her—but does not want to pay the full amount of child support.

She testified that Noll's child support should not be lowered based on future monthly visitation because Noll had visited only when he was trying to reconcile, had not shown an interest in exercising the visitation he had been granted, and would not—in her opinion—fly monthly to North Carolina as he had testified he intended to do. She asked the court to deny his request to lower his child-support obligation to off-set his expected travel expenses in visiting the children out of state.

The court's rendition

At the end of the short hearing, the trial court announced its ruling from the bench. The court noted the parties' stipulation that the amount of child support under the guidelines would be $1,822. The court noted that, under Section 154.123 of the Family Code, it may order child-support payments in a different amount if evidence rebuts the presumption that the guideline amount is in their best interest. The court then ruled that the evidence supported a variance from the guideline amount. The court stated that it considered the factors listed in Section 154.123, and, in particular, the cost of travel to exercise possession and access to the children. The court reduced

the child support to $800 below the guideline amount to off-set travel expenses and ordered a new child-support monthly obligation of $1,022.

Colbert-Noll appealed.

Variance from Guidelines

In her first issue, Colbert-Noll contends that the trial court abused its discretion in granting the variance from the statutory child-support guideline amount.

A. Standard of review

The standard of review for a trial court's ruling on child support is abuse of discretion. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *Brejon v. Johnson*, 314 S.W.3d 26, 29 (Tex. App.—Houston [1st Dist.] 2009, no pet.). The test is whether the trial court acted arbitrarily, unreasonably, or without reference to guiding rules or principles. *Brejon*, 314 S.W.3d at 29. We review the evidence in the light most favorable to the trial court's ruling and indulge every legal presumption in favor of the order. *Id.*

Under the abuse of discretion standard, legal and factual insufficiency are not independent, reversible grounds of error. Instead, they are relevant factors in assessing whether the trial court abused its discretion. *Patterson v. Brist*, 236 S.W.3d 238, 240 (Tex. App.—Houston [1st Dist.] 2006, pet. dism'd). To determine whether a trial court abused its discretion because the evidence is legally or factually

insufficient to support its decision, we consider whether the trial court (1) had sufficient evidence upon which to exercise its discretion and (2) erred in its application of that discretion. *Moroch v. Collins,* 174 S.W.3d 849, 857 (Tex. App.—Dallas 2005, pet. denied). We conduct the applicable sufficiency review when considering the first prong of the test. *Id.* We then determine whether, based on the evidence, the trial court made a reasonable decision. *Id.* A trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support the decision. *Id.*

When, as here, a trial court does not issue findings of fact and conclusions of law, we will affirm the trial court's judgment if it can be upheld on any legal theory supported by the evidence. *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987).

B. Applicable law

A trial court has discretion to set child support within the parameters provided by the Texas Family Code, which establishes guidelines for setting monthly child-support obligations in suits affecting the parent-child relationship. *Iliff v. Iliff,* 339 S.W.3d 74, 78 (Tex. 2011); *see* TEX. FAM. CODE §§ 154.121–.133. The court is also given broad discretion to modify the amount to increase or decrease the obligation. *In re D.S.*, 76 S.W.3d 512, 520 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

The Section 154 guideline amounts are presumptively reasonable. TEX. FAM. CODE § 154.122(a). The trial court may order child support payments in an amount that varies from the guidelines "if the evidence rebuts the presumption that application of the guidelines is in the best interest of the child and justifies a variance from the guidelines." *Id.* § 154.123(a). In determining whether an application of the child-support guidelines would be unjust or inappropriate in a particular case, the court is to consider evidence of all relevant factors. *Id.* § 154.123(b) (listing factors). And the trial court is required to make specific findings supporting any such variance. *Id.* § 154.130(a)(3), (b).

C. Analysis

A 2019 tax form reflects that Noll makes $75,800 per year. Monthly child support for four children, given Noll's net income and his other child-support obligation, according to the parties' stipulation, is $1,822.11. The trial court reduced Noll's monthly child-support obligation to an amount $800 per month less than the guideline amount. The trial court specifically noted that it considered all the Section 154 factors and gave particular weight to factor 14, which allows the trial court to take into account the cost of travel to exercise possess of and access to the children. *Id.* § 154.123(b)(14).

Noll presented evidence that it would cost an average of $800 in airfare to exercise his visitation. While the chart was created with trips to Maryland in mind,

he testified that, based on his experience, visitation in North Carolina, where Colbert-Noll and the children moved two months before trial, would cost about the same.

Noll presented evidence of many more categories of expenses he anticipated he would incur if he were to exercise the full amount of visitation the Maryland court's order permitted. And he testified that he intended to use all his visitation. Those other expenses averaged over $1,000 per month above the airfare already mentioned. Colbert-Noll challenged several of these projected expenses. Even if the trial court disregarded them all and only credited the evidence related to airfare, Noll provided sufficient evidence from which the trial court could have determined that $800 per month is a reasonable evaluation of the cost to exercise visitation. *See In re B.J.M.*, No. 04-14-00300-CV, 2015 WL 1244804, at *2 (Tex. App.—San Antonio Mar. 18, 2015, no pet.) (mem. op.) (concluding that father provided some evidence of a substantive and probative character to support the reduction in child support to off-set travel costs for visitations).

The trial court has the sole authority to weigh the credibility of the witnesses. *Brown v. Brown*, 236 S.W.3d 343, 348 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Noll testified that he intended to use his monthly visitation and that his past lapses were due to Colbert-Noll's interference with his visitation efforts. Based on that testimony, which the trial court could credit, and Noll's testimony about the cost

of airfare to exercise visitation, we conclude that there is legally and factually sufficient evidence to support the trial court's ruling. *See In re B.J.M.*, 2015 WL 1244804, at *2.

Noll testified that he wants to visit his children every month. And Colbert-Noll testified that she wants the children to have a relationship with Noll. The trial court did not abuse its discretion in concluding that reducing child support to ease the burden of visitation was in the children's best interest because doing so would increase the likelihood that Noll would maintain a bonded relationship with his children, who had moved out of state with their mother. We conclude that the trial court's ruling to reduce child support to off-set the cost of traveling to exercise visitation was not an abuse of discretion. *See id.* (holding that trial court did not abuse its discretion in reducing the father's monthly child-support obligation from guideline amount of $1,875 to just $400 per month "to offset the cost of travel for [the father]'s possession and access to the children").

Evidence of Colbert-Noll's Interference with Visitations

In her second issue, Colbert-Noll contends that the trial court abused its discretion in considering Noll's evidence of instances when she allegedly denied him possession of and access to the children.

A. Standard of review and applicable law

Evidence is relevant if it tends to prove or disprove a fact in issue. TEX. R. EVID. 401. Relevant evidence is generally admissible. TEX. R. EVID. 402. The admission or exclusion of evidence is within the trial court's discretion. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012). A trial court abuses its discretion when it acts without regard to guiding rules or principles. *Id.* Even if the trial court abused its discretion in admitting certain evidence, reversal is appropriate only if the error was harmful and probably led to an improper judgment. *Id.*

B. Analysis

Colbert-Noll argues that the evidence of her alleged past interference was irrelevant to the determination of a child-support amount that would be in the children's best interest. She argues that the accusation of interference appears to have "weighed heavily on the Court's decision to reduce [Noll]'s child support by $800.00 when there was no actual proof that [he] would spend as much as $800.00 to exercise his court-ordered periods of possession."

The record does not support her argument. First, the evidence shows that Noll would spend $800 per month, or more, on visitations. He testified as such and submitted a chart detailing his anticipated expenses for future visits, including an estimated $800 per month for airfare, plus additional amounts for hotels and ground transportation.

Second, the evidence of past interference was relevant in that Colbert-Noll was arguing that Noll's poor record of exercising visitation should be a factor in the court's determination of whether Noll would exercise visitation in the future. According to Colbert-Noll, the fact that Noll missed many opportunities to visit the kids over the past year meant that he would not exercise his visitation rights in the future and, as a result, would not incur travel expenses to do so. Thus, whether Noll's visitation history signaled his future efforts and future expenses was a fact at issue in the case.

Noll sought to counter Colbert-Noll's argument by providing evidence of why he missed visits in the past: Colbert-Noll's alleged interference with his efforts to visit the children. A reason for missed visits in the past was relevant to the court's evaluation of whether Noll would exercise visits in the future and, in doing so, incur travel expenses. And the burden of travel expenses incurred in exercising visitation is a statutory factor for the trial court to consider in establishing child-support amounts. TEX. FAM. CODE § 154.123(b)(14).

We conclude that the evidence was relevant and that the trial court did not abuse its discretion in denying Colbert-Noll's relevance objection. *See In re J.M.C.*, No. 02-09-00292-CV, 2010 WL 2889671, at *5–7 (Tex. App.—Fort Worth July 22, 2010, no pet.) (mem. op.) (concluding that trial court did not err in lowering child

support far below the statutory guidelines to off-set travel expenses, considering mother's past noncooperation with visits).

Conclusion

We affirm.

Sarah Beth Landau
Justice

Panel consists of Chief Justice Radack and Justices Landau and Countiss.