AFFIRM IN PART; REVERSE AND REMAND IN PART; Opinion Filed July 20, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01431-CV

SCOTT ALAN COPELAND, Appellant
V.
DIANE COPELAND, Appellee

On Appeal from the 219th Judicial District Court
Collin County, Texas
Trial Court Cause No. 219-54524-2018

MEMORANDUM OPINION

Before Justices Schenck, Partida-Kipness, and Nowell
Opinion by Justice Schenck

Scott Alan Copeland ("Father") appeals the trial court's protective order. In his first three issues, Father challenges the trial court's jurisdiction, the sufficiency of the pleadings and evidence to support the lifetime duration of the protective order, and the sufficiency of the evidence to support certain of the trial court's findings of fact. In his fourth issue, Father argues the protective order contains internal inconsistencies that render it invalid. We reverse those portions of the trial court's order that provide for supervised possession of and access to the children and remand this case to the trial court for further proceedings regarding whether Father may have

possession of or access to the children. In all other respects, we affirm the trial court's order. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

In October 2016, Diane Copeland ("Mother") and Father were divorced in Fannin County, Texas. The final divorce decree identified two minor children born to the marriage in 2002 and appointed Mother sole managing conservator and Father possessory conservator of the children and provided for Father to have supervised possession of and access to the children.[1] The same month the divorce decree was entered, the trial court signed a First Amended Final Protective Order ("Fannin Protective Order"), which named Mother as the "Protected Person" and prohibited Father from, among other things, committing family violence against or otherwise harassing Mother. The Fannin Protective Order remained in effect for two years from August 4, 2016.

On August 2, 2018, Mother filed an application for a protective order in Collin County. That same day, the trial court granted a temporary ex parte protective order effective for two weeks. That order was later extended a further two weeks, when the trial court conducted a hearing on Mother's application. At the conclusion of that hearing, the trial court signed an order defining "protected person" to mean

[1] The record reflects Mother and Father have three children, but at the time of their divorce, their oldest child was eighteen and thus not provided for in the final divorce decree.

Mother and the children and including the same provisions for supervised possession of and access to the children as had been ordered in the divorce decree. On September 7, the trial court signed a nunc pro tunc final protective order ("Collin Protective Order"). Father filed a request for findings of fact and conclusions of law, a notice of past due findings of fact and conclusions of law, and a motion for new trial. The trial court signed findings of fact and conclusions of law. Father timely filed this appeal.

DISCUSSION

I. Subject Matter Jurisdiction

In his first issue, Father argues the trial court lacked jurisdiction over this matter, urging that the Fannin County District Court acquired continuing and exclusive jurisdiction over this matter when it rendered the final divorce decree. We review a trial court's subject matter jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

The Texas Family Code provides a court acquires continuing, exclusive jurisdiction over matters provided for by Title 5—governing the parent–child relationship—in connection with a child on the rendition of a final order. *See* TEX. FAM. CODE ANN. § 155.001(a). However, Title 4, which governs protective orders, clearly contemplates that an application for a protective order may be filed in another county on behalf of a child who is subject to the continuing jurisdiction of a court under Title 5. Section 85.063 provides that if a final divorce decree has been

rendered, an application for a protective order "filed in another county, shall be filed in a court having jurisdiction to render a protective order under this subtitle." *See id.* § 85.063.[2] As further evidence that a court other than the court of continuing jurisdiction may issue a protective order, Section 82.007 provides the application must include a copy of each court order affecting the conservatorship, support, and possession of or access to the child, or a statement that the orders affecting the child are unavailable to the applicant and that a copy of the orders will be filed with the court before the hearing on the application. *Id.* § 82.007.

In his reply brief, Father directs us to an opinion from this Court that determined applications for protective orders should be filed in the court that rendered the final divorce decree. *Cooke v. Cooke*, 65 S.W.3d 785, 790 (Tex. App.—Dallas 2001, no pet.). However, that opinion did not address the subject matter jurisdiction issue we confront here. Rather, *Cooke* addressed whether a different court within the same county as the court that rendered the final divorce decree had primary jurisdiction. *See id.* Moreover, an earlier (and hence

[2] Section 85.063 provides as follows:

> (a) If a final order has been rendered in a suit for dissolution of marriage or suit affecting the parent-child relationship, an application for a protective order by a party to the suit against another party to the suit filed after the date the final order was rendered, and that is:
> (1) filed in the county in which the final order was rendered, shall be filed in the court that rendered the final order; and
> (2) filed in another county, shall be filed in a court having jurisdiction to render a protective order under this subtitle.

FAM. § 85.063.

controlling)[3] opinion from this Court held that "a proceeding for protective orders brought under Title 4 is an independent remedy which is not limited to the court having continuing jurisdiction." *Magill v. Sheffield*, 612 S.W.2d 677, 679 (Tex. Civ. App.—Dallas 1981, no writ). Consequently, we must reject Father's argument that only the court of continuing, exclusive jurisdiction is authorized to issue a protective order.

As part of his first issue, Father argues that even assuming the trial court had jurisdiction to issue a protective order, the trial court treated the proceeding as a motion for contempt, rather than an application for a protective order, by restricting Father's presentation of evidence to the issue of whether Father had violated the Fannin Protective Order and preventing him from presenting evidence as to whether the Fannin Protective Order was necessary. Father urges this restriction materially hindered his ability to present his case.

Father cites two instances in the record where the trial court restricted his presentation of evidence. In the first instance, Father, proceeding pro se, questioned Mother regarding the physical abuse she claimed she sustained during their marriage and the reasons she gave in support of her application for the protective order.

[3] Under the rule of orderliness, panels of the court lack the ability to reverse each other. *MobileVision Imaging Servs., L.L.C. v. LifeCare Hosps. of N. Tex., L.P.*, 260 S.W.3d 561, 566 (Tex. App.—Dallas 2008, no pet.). Barring an intervening statutory or constitutional amendment affecting the underlying subject matter or a reversal by a higher court or this court sitting en banc can set aside a prior panel precedent. *Id.*

Mother's counsel objected to the line of questioning on the basis of relevance. The trial court sustained Mother's objection, and Father responded as follows:

> Father: Your Honor, it's -- I'm not going to say not relevant, I'm here because they say I've violated the -- they say the protective order, and this is the protective order that they're talking about. I'm just asking her to define what it is.
>
> THE COURT: You don't get to talk about how she got the protective order. Now you get to talk about whether or not you violated it.

In the second instance, Father's questions sought to determine whether Mother had released his drug test results to anyone. The trial court interrupted Father's questioning of Mother to state the following:

> THE COURT: I'm having a hard time seeing how any of this relates to the defense of whether or not you have violated this protective order that's in place.
>
> PRO SE: Well, it was --
>
> THE COURT: This is not an opportunity to just go over all the things you didn't get along with her over the past however many years.
>
> PRO SE: I understand. I wasn't trying to be argumentative, at the same point it was just --
>
> THE COURT: I'm not saying you're argumentative, I'm saying you need to focus on that issue.

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *In re A.M.*, 418 S.W.3d 830, 836 (Tex. App.—Dallas 2013, no pet.). The trial court generally abuses its discretion only if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Id.*

The family code requires a trial court to make certain findings when issuing a protective order, including that family violence has occurred and is likely to occur in the future. *See* FAM. § 85.001. Father argues the trial court prevented him from presenting evidence as to the issuance of the Fannin Protective Order and why that order was necessary in the first instance. Father's efforts to challenge the evidentiary showing in Fannin County amount to a collateral attack on the Fannin Protective Order, rather than a direct defense to Mother's application for a protective order. *See, e.g.*, *Dillard v. State*, No. 05-00-01745-CR, 2002 WL 31845796, at *6 (Tex. App.—Dallas Dec. 20, 2002, no pet.) (not designated for publication). To prevail on such an attack, Father would be required to show that the Fannin Protective Order was void on its face without relying on any extrinsic evidence. *See Alderson v. Alderson*, 352 S.W.3d 875, 879 (Tex. App.—Dallas 2011, pet. denied). Evidence that the Fannin Protective Order was obtained with insufficient evidence of family violence would be improper. *See id.*[4] Accordingly, we cannot conclude the trial court abused its discretion by excluding such evidence.

We overrule Father's first issue.

[4] Further, we note Father could have, but did not, challenge the Fannin Protective Order on direct appeal. *See* FAM. § 81.009.

II. Lifetime Duration of the Collin Protective Order

In his second issue, Father urges Mother's pleadings did not request and the evidence in the record does not support the lifetime duration of the Collin Protective Order

Section 85.025 of the family code provides the default duration of a protective order issued pursuant to Title 4 of the family code to be two years. *See* FAM. § 85.025(a). A court may issue a protective order effective for a period greater than two years if the court makes one or more of the following findings concerning the person who is the subject of the protective order:

> (1) committed an act constituting a felony offense involving family violence against the applicant or a member of the applicant's family or household, regardless of whether the person has been charged with or convicted of the offense;
>
> (2) caused serious bodily injury to the applicant or a member of the applicant's family or household; or
>
> (3) was the subject of two or more previous protective orders rendered:
>
> (A) to protect the person on whose behalf the current protective order is sought; and
>
> (B) after a finding by the court that the subject of the protective order:
>
> (i) has committed family violence; and
>
> (ii) is likely to commit family violence in the future.

Id. § 85.025(a-1).

As to his arguments regarding the sufficiency of Mother's pleadings, Father urges her failure to provide him with notice of her intention to seek a protective order

for the duration of his lifetime violates the fair-notice standard for pleading. Texas follows a "fair notice" standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000). Stated somewhat differently, the fair-notice standard measures whether the pleadings have provided the opposing party sufficient information to enable that party to prepare a defense or a response. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 224–25 (Tex. 2017).

Mother's application for protective order complies with the requirements of the family code by including Mother's, Father's, and their children's names and counties of residence, the relationships between the parties, and request for protective orders, and by attaching copies of the divorce decree and the Fannin Protective Order. *See* FAM. §§ 82.004, 82.006, 82.007. Father has not cited, and we have not found, any authority requiring the application to include the duration of the protective order sought, but even if Mother were required to put Father on notice that she sought a protective order effective for more than two years, we note that her application also alleges Father "has committed an act that constitutes a felony offense involving family violence against applicant since the last protective order has been issued," which tracks the requisite finding language set forth in Section 85.025(a-1)(1) allowing a protective order effective for more than two years. *See id.* § 85.025(a-1). Accordingly, we cannot conclude Mother's application provided

Father with insufficient information to enable him to prepare a defense or a response. *See Parker*, 514 S.W.3d at 224–25.

We now address Father's arguments challenging the sufficiency of the trial court's findings and of the evidence to support the lifetime duration of the Collin Protective Order.[5]

In determining whether the evidence is legally sufficient to support a finding, we consider the evidence in the light most favorable to the judgment and indulge every reasonable inference that would support it. *Floyd v. Floyd*, No. 05-15-00997-CV, 2016 WL 4690030, at *2 (Tex. App.—Dallas Sept. 7, 2016, no pet.) (mem. op.) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005) (reviewing sufficiency of evidence to support finding of family violence to support protective order)). We must credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *Id.* A legal sufficiency challenge to a family-violence protective order may be sustained only when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more

[5] Father's briefs do not explicitly state whether he is challenging the legal or factual sufficiency, or both, of the evidence. However, we construe his challenge to be to the legal sufficiency based on the language used in his brief: "The record here is completely absent of any evidence of family violence, felony or otherwise."

than a mere scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *Id.*

As noted above, a trial court may issue a protective order effective for a period greater than two years if the court makes a finding that the respondent committed an act constituting a felony offense involving family violence against the applicant or a member of the applicant's family or household, regardless of whether the person has been charged with or convicted of the offense. *See* FAM. § 85.025(a-1)(1). The family code defines "family violence" to include:

> an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself . . . .

FAM. § 71.004(1). Here, the trial court issued findings of fact and conclusions of law, including the following:

> The Court FINDS that Respondent, SCOTT ALAN COPELAND, committed an act constituting a felony offense involving family violence against applicant and that a protective order exceeding two years is necessary to protect applicant pursuant to Texas Family Code Section 85.025.

The record contains the following evidence to support the above finding. Mother offered and the trial court admitted, without objection from Father, a copy of an indictment of Father, charging him with intentionally communicating directly with Mother, in a threatening and harassing manner, in violation of the Fannin

Protective Order by sending electronic messages to Mother. The indictment references section 25.07 of the penal code, which criminalizes such conduct.[6] *See* TEX. PENAL CODE ANN. § 25.07.[7] Further, under section 25.072, it is a third-degree felony offense if a person engages in two or more instances of such conduct during a period that is twelve months or less in duration. *See id.* § 25.072. The trial court admitted a copy of the Fannin Protective Order prohibiting Father from, among other thing, "communicating in any manner with [Mother] except through [Father's] attorney save and except communications between the parties to facilitate visitation and access to the children." The order further indicated its effective period began August 4, 2016. The record contains multiple emails and text messages sent by Father to Mother, during a period less than twelve months after August 4, 2016, discussing topics other than visitation and access to the children and did so in a harassing and threatening manner.[8]

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[6] In his reply brief, Father offers evidence that the charge was dismissed. Regardless of whether that evidence is properly before this Court, we note that the statute specifies the requisite finding may be made "regardless of whether the person has been charged with or convicted of the offense." *See* FAM. § 85.025(a-1)(1).

[7] A person commits an offense if, in violation of . . . an order issued under . . . Chapter 85, Family Code, the person knowingly or intentionally: . . . communicates directly with a protected individual . . . in a threatening or harassing manner . . . ." *See* TEX. PENAL CODE ANN. § 25.07(a)(2)(A).

[8] The emails and text messages contained multiple expletives and criticisms of Mother. In one email, Father threatened to continue sending one email each hour until Mother responded with an answer to his question.

Mother testified she found the following language "alarming" and perceived it as a death threat: "you leave me no choice but to unleash my plan that is going to blow up your 'case' against me and put you squarely in the crosshairs that no attorney or judge can do a damn thing about it."

We conclude the foregoing evidence is legally sufficient to support the trial court's finding supporting the duration of the protective order. Accordingly, we overrule Father's second issue.

III. Sufficiency of the Evidence to Support Findings of Fact

In his third issue, Father challenges the legal and factual sufficiency of the evidence to support the trial court's findings that Father posed any threat to his children so as to include them as "protected persons" in the Collin Protective Order

In determining whether the evidence is legally sufficient to support a finding, we apply the same standard set forth above. *See Floyd*, 2016 WL 4690030, at *2. In reviewing a factual sufficiency challenge, we weigh all the evidence in the record. *Id.* at *3. We will overturn a finding only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Id.*

A party appealing from a nonjury trial in which the trial court made findings of fact and conclusions of law should direct his attack on the sufficiency of the evidence at specific findings of facts, rather than at the judgment as a whole. *See Shaw v. Cnty. of Dallas*, 251 S.W.3d 165, 169 (Tex. App.—Dallas 2008, pet. denied). A challenge to an unidentified finding of fact may be sufficient if we

The trial court also admitted a text message containing the following threatening statement: "Because surely you know that as long as you carry on as is, I will never lay down and give up. Never. The state of society and the problem with abuse gave you an easy head start. I will finish it."

can fairly determine from the argument the specific finding of fact which the appellant challenges. *Id.*

Although the trial court made several findings of fact and conclusions of law, at Father's request, Father does not identify which specific findings he challenges in connection with his third issue. However, his brief, read liberally, appears to challenge any and all findings that would support the trial court's decision to include the children as "protected persons" in the order by arguing that the record does not contain any evidence that Father's actions were directed at anyone other than Mother. The findings related to the children are as follows:

> The Court finds that, during the period the protective order was in force, [Father] violated the order by committing mental, emotional and verbal abuse by repeatedly sending electronic messages of a threatening and harassing nature to [Mother] by text message and by email and through social medial. [Father] placed [Mother and the children] in fear of imminent harm, bodily injury, assault, or sexual assault by his communications above.
>
> [Father] violated the protective order by communicating directly with [Mother and the children] repeatedly in a threatening and harassing nature by email, text message, social media and electronic communication.

The record contains multiple emails, text messages, and social media posts, most of which are directed towards Mother, as well as Mother's testimony explaining her perception of these messages. The following evidence supports the challenged findings.

- Handwritten notes on copies of text exchange between Mother and Father indicate the children missed a visitation with Father because he

had not taken a drug test and they were afraid to visit with him without that proof of his sobriety. The handwritten notes also state that one of the children is afraid of Father and his behavior and that she has been talking to the counselors at school about it.

- Father sent a group text that includes one of the minor children as a recipient in which he included a copy of a citation and described a past incident of sexual assault against Mother that was not perpetrated by Father.

- Father posted twice on social media messages that could be construed as threatening but are vague as to whom Father is threatening. The first post states that Father intends to make someone "rue the day they ever did xyz." The second post includes an excerpt from *Rambo* titled "Rambo–I'm coming to get YOU!" Mother testified the posts were alarming in nature and caused a lot of distress in her home. Mother testified that, although she had blocked Father on social media, she knew about his posts from friends of hers who were concerned for her safety and well-being and for the children's well-being. "Everyone knows what this was pinpointed towards." Mother also testified the "rue the day" post referenced the date of a contempt hearing in their case as the day "the fuel tank ran empty."[9]

In reviewing the foregoing, we cannot conclude (1) the record discloses a complete absence of evidence that the children were threatened by Father's messages; (2) the court is barred by rules of law or of evidence from giving weight to the foregoing evidence; (3) the evidence above is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite. *See Floyd*, 2016 WL 4690030, at *2. Further, after reviewing the entire record, we cannot conclude the challenged findings are so contrary to the great weight and preponderance of the

[9] The record also contains text messages to Mother in which Father stated he posed a "clear and present danger" to one of the children and that he "beats the females he loves most," but in both instances, the context of the statements indicate Father was insincere and sarcastic in making these statements.

evidence as to be clearly wrong and manifestly unjust. *See id.* at *3. Accordingly, we conclude the evidence is legally and factually sufficient to support the challenged findings.

We overrule Father's third issue.

IV. Inconsistencies in the Collin Protective Order

In his fourth issue, Father urges the Collin Protective Order contains two provisions that are inconsistent so as to render the order void. Father notes the Collin Protective Order names the children as "protected persons" and prohibits Father from, among other things, communicating with or being within 500 feet of a protected person. Father notes that the "protected persons" provisions conflict with the provisions for his supervised possession of and access to the children.

Mother responds that the provisions may be read together such that Father is prohibited from communicating with or being near the children except as outlined in the supervised possession and access provisions. However, the Collin Protective Order contains no such provision to except the supervised possession provision from the "protected persons" provisions. Mother alternatively states that if this Court determines the provisions conflict so as to make the Collin Protective Order difficult or impossible to enforce, she would agree that the language should be clarified by the trial court to allow Father to be in the presence of the children and communicate with the children solely as provided for in the possession and access provisions of the Collin Protective Order.

A judgment must be sufficiently definite and certain to define and protect the rights of all litigants, or it should provide a definite means of ascertaining such rights, to the end that ministerial officers can carry the judgment into execution without ascertainment of facts not therein stated. *Stewart v. USA Custom Paint & Body Shop, Inc.*, 870 S.W.2d 18, 20 (Tex. 1994). The Collin Protective Order's lifetime prohibition of contact with the children effectively terminates Father's parental rights with respect to his possession of or access to the children. But, as Father notes, the Collin Protective Order also provides for Father's supervised possession of or access to the children and includes a finding that such provisions are in the children's best interest. We conclude the Collin Protective Order contains internally conflicting provisions such that ministerial officers could not execute it without ascertainment of facts not therein stated. *See id.* Accordingly, we sustain Father's fourth issue to the extent that we conclude the trial court erred by issuing this order prohibiting Father from, among other things, communicating with or being within 500 feet of the children and also providing for his possession of those same children without indicating how those provisions should be reconciled. *See id.*

CONCLUSION

We reverse the portions of the trial court's order that provide for supervised possession of and access to the children and remand this case to the trial court for further proceedings regarding whether Father may have possession of or access to

the children. *See* TEX. R. APP. P. 43.3. In all other respects, we affirm the trial court's order.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

SCOTT ALAN COPELAND, Appellant No. 05-18-01431-CV V. DIANE COPELAND, Appellee	On Appeal from the 219th Judicial District Court, Collin County, Texas Trial Court Cause No. 219-54524-2018. Opinion delivered by Justice Schenck. Justices Partida-Kipness and Nowell participating.

In accordance with this Court's opinion of this date, the order of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** the portions of the trial court's order that provide for supervised possession of and access to the children and **REMAND** this case to the trial court for further proceedings regarding whether Father may have possession of or access to the children. In all other respects, the trial court's order is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear his or her own costs of this appeal.

Judgment entered this 20th day of July, 2020.