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| JORGE ESCALANTE, | § | No. 08-18-00067-CV |
| Appellant, | § | Appeal from the |
| v. | § | 388th District Court |
| CLAUDIA B. ESCALANTE, | § | of El Paso County, Texas |
| Appellee. | § | (TC# 2015DCM8192) |

**O P I N I O N**

This is an appeal from a final divorce decree, following a bench trial, in which the trial court granted a divorce between Appellant, Jorge Escalante and Appellee, Claudia Escalante. Appellant raises two issues: (1) the evidence was legally and factually insufficient to support a finding of adultery; and (2) the trial court abused its discretion in limiting his right of possession of the parties' three children during his weekend visitation.

We affirm the judgment of the trial court.

**BACKGROUND**

Appellee filed her original petition for divorce citing insupportability and adultery as grounds for a divorce. She amended to allege cruelty as an additional ground. In her petition, Appellee sought a disproportionate share of the community estate based on a variety of factors, including Appellant's alleged adultery, benefit she would have derived from the continuation of the marriage, and disparity of earning power of the spouses.

Appellee testified she was a prison guard at a federal penitentiary, compensated at the GS 8 level. She testified Appellant was a border patrol agent, compensated at the GS 12 level. Among the items to be divided were each of their government Thrift Savings Plans and their Federal Employee Retirement System accounts. The parties also had significant debt to be distributed, including Appellee's student loan debt, which was incurred during the marriage. The parties also sought distribution of multiple vehicles, the marital household, and bank and investment accounts.

***Final Decree of Divorce***

In its final decree, the trial court found Appellant had committed adultery and granted Appellee the divorce. It made the following additional findings which are pertinent to this appeal:

**1. Conservatorship and Access to Children**

The trial court named both parents joint managing conservators of their three children. Among other rights and obligations awarded to each parent, Appellee was granted the exclusive right to designate the children's primary residence within El Paso County. The trial court entered a possession order, which provided Appellant access to the children beginning at 10:00 a.m. on the first, third, and fifth Saturdays of the month, and ending at 6:00 p.m. the following Sunday. The order also provided for possession over holidays and school breaks, which is not at issue in this appeal.

The trial court ordered Appellant to pay Appellee $2,110.03 monthly in child support with step-down provisions for each child as they turned eighteen-years' old. Appellant is also required to provide health insurance for each child.

2. Division of Marital Estate

Appellee was awarded temporary use and possession of the home, with Appellant ordered to assume payment of the mortgage beginning February 1, 2018. Appellee was awarded a judgment

for $65,650.43 as her portion of equity in the home. Appellant was ordered to refinance the property in his name, or if unable to do so, to list and sell the property. If the home was refinanced and once Appellee's judgment was satisfied, Appellee had thirty days to vacate the premises, upon which it became the sole property of Appellant.

Appellee also received all household furniture and effects in her possession or subject to her sole control, in addition to her clothing, jewelry, and other personal effects in her possession or subject to her control.

Appellee received 55 percent of Appellant's retirement benefits in the Federal Employee Retirement Systems from his employment with the U.S. Border Patrol as of the date of divorce, and 50 percent of her earned retirement benefits in the Federal Employee Retirement Systems arising out of her employment with FCI La Tuna Bureau of Prisons as of the date of the divorce. She likewise received 60 percent of Appellant's benefits in the Thrift Savings Plan associated with his federal employment and 50 percent of her earned Thrift Savings Plan benefits from her federal employment. Appellee was also awarded possession of an investment account in one of their son's names.

The trial court awarded Appellant ownership of the house, less Appellee's portion of its equity, upon refinancing it in his name. He received all household furnishings and other effects in his possession or subject to his sole control. He received 50 percent of Appellee's earned federal retirement benefits and benefits in her Thrift Savings Plan earned from her federal employment. Of his earned retirement, the trial court awarded him 45 percent as of the date of the divorce, and 40 percent of his Thrift Savings Plan earnings. The trial court awarded him his Roth IRA account, and a non-retirement Waddell Reed account, as well as multiple Edward Jones accounts.

Additionally, Appellant was awarded four vehicles and a toy collection.

### *Procedural History*

Following the trial court's entry of its Findings and Orders of Final Divorce on January 29, 2018, Appellant filed a Motion to Reconsider, Modify, Correct or Reform Judgment on February 2, 2018. The trial court denied Appellant's motion on March 20, 2018. It entered its Final Decree of Divorce on April 24, 2018, the same day Appellant filed its Notice of Appeal.

## DISCUSSION

Appellant presents two issues on appeal:

1. Whether the trial court abused its discretion finding Appellant committed adultery and granting Appellee's divorce on this at-fault ground; and

2. Whether the trial court abused its discretion by "materially deviating" from the Standard Possession Order under the Texas Family Code by limiting Appellant's right to possession of the couple's three children.

### *Findings of Fact and Conclusions of Law*

The trial court did not enter findings of fact or conclusions of law. Appellant requested findings of fact and conclusions of law on March 23, 2018. However, the trial court did not make any findings, and Appellant failed to file a Notice of Past Due Findings of Fact and Conclusions of Law pursuant to Rule 297 of the Texas Rules of Civil Procedure. *See* TEX.R.CIV.P. 297. Accordingly, Appellant waived his right to complain about the trial court's failure to file findings of fact and conclusions of law. *Sonnier v. Sonnier*, 331 S.W.3d 211, 214 (Tex.App.--Beaumont 2011, no pet.). Because Appellant did not properly request findings of fact and conclusions of law, the trial court's judgment "implies all necessary finding[s] of fact to support it," and "must be affirmed if it can be upheld on any legal theory that finds support in the evidence." *Schoeffler v. Denton*, 813 S.W.2d 742, 744-745 (Tex.App.--Houston [14th Dist.] 1991, no writ)(*citing Lemons v. EMW Mfg. Co.*, 747 S.W.2d 372, 373 (Tex. 1998)(per curiam) and *Lassiter v. Bliss*, 559 S.W.2d

353, 358 (Tex. 1978), *overruled on other grounds by Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989)).

***Adultery***

In his first issue, Appellant posits the trial court abused its discretion in finding Appellant committed adultery and granting Appellee's divorce on this ground. He claims the evidence was legally insufficient to support such a claim, and no positive proof was offered regarding his alleged adultery. Appellant contends Appellee's testimony that she learned of the affairs from colleagues was improperly admitted over Appellant's hearsay objection and, even if admissible, constituted nothing more than "rumor and innuendo." Appellant maintains he "denied the adultery allegations" when questioned about them, and Appellee offered no witnesses to prove the alleged acts of adultery. Appellant asks this Court to reform the judgment to remove the at-fault finding of adultery, and remand to the trial court to "reconsider the unequal and unfair division of the property of the marital estate it made based on [the] no-fault divorce ground[]" of insupportability.

Appellee argues the trial court's finding is sufficiently supported by her testimony that she discovered Appellant's adultery after his girlfriends contacted her. Appellee contends that evidence is further bolstered by her testimony that she received "text messages from lovers, findings [SIC] pictures, obtaining pictures and reports regarding adultery from a private investigator (provided during discovery, [and] [the parties' sons] being exposed to girlfriends since the time of separation." Appellee argues, although such evidence is circumstantial, adultery may be proven by such evidence. *See In Re C.A.S. & D.P.S.*, 405 S.W.3d 373, 383 (Tex.App.--Dallas 2013, no pet.).

***Standard of Review***

A trial court "'may grant a divorce in favor of one spouse if the other spouse has committed adultery.'" *Gerges v. Gerges*, No. 08-19-00006-CV, 2020 WL 913839, at *12 (Tex.App.--El Paso Feb. 26, 2020, no pet. h.)(*citing* TEX.FAM.CODE ANN. § 6.003). Whether a trial court erred in granting divorce based on a finding of adultery is reviewed under an abuse of discretion standard. *In re Marriage of CA.S. & D.P.S.*, 405 S.W.3d at 382; *see also Gerges*, 2020 WL 913839, at *12 (analyzing adultery finding under abuse of discretion standard). When a trial court acts unreasonably or arbitrarily, "without reference to [any] guiding [rules and] principles," or acts arbitrarily in such a manner which amounts to clear and prejudicial error in application of the law, it is an abuse of discretion. *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996); *accord Hyundai Motor Co. v. Vasquez*, 189 SW.3d 743, 766 (Tex. 2006) (Medina, J., dissenting, joined by Wainwright & Johnson, JJ.).

"Under an abuse of discretion standard, legal and factual insufficiency issues are not independent grounds of error, but are relevant factors in assessing whether the trial court abused its discretion." *In the Interest of S.A.A. and J.D.A., Children*, 279 S.W.3d 853, 855-56 (Tex.App.--Dallas 2009, no pet.)(*citing Garner v. Garner,* 200 S.W.3d 303, 306 (Tex.App.--Dallas 2006, no pet.)). The evidence is viewed in the light most favorable to the order and the reviewing court should "indulge every presumption in favor of the trial court's ruling." *Id.* at 856, (*citing Garner,* 200 S.W.3d at 306). Where there is at least some evidence supporting the trial court's order, no abuse of discretion has occurred. *Id.*

***Analysis***

Adultery is the "voluntary sexual intercourse of a married person with one not the spouse." *Gerges*, 2020 WL 913839, at *12. A party may prove adultery by direct or circumstantial evidence; however, the proof must be "clear and positive[,]" and "'mere suggestion and innuendo are

insufficient.'" *Id.*, (*citing In re: Marriage of C.A.S. & D.P.S.*, 405 S.W.3d at 383); *see also Ayala v. Ayala*, 387 S.W.3d 721, 733 (Tex.App.--Houston [1st Dist.] 2011, no pet.). Additionally, actions otherwise constituting adultery which occur *after* the parties are already separated may still be considered adultery in determining fault grounds for granting divorce. *Gerges*, 2020 WL 913839, at *12, (*citing In re: Marriage of C.A.S. & D.P.S.*, 405 S.W.3d at 383).

In the instant case, Appellee cited adultery as one of the grounds for seeking divorce from Appellant. Both parties testified regarding Appellant's alleged adultery at the final hearing. Appellee testified she was personally aware of seven affairs by her husband during their marriage after she was contacted by, among others, her husband's girlfriends. She denied Appellant ever admitted his infidelity to her, despite confronting him numerous times. Appellee also testified she was contacted by one of his girlfriends, who works for CPS, in 2017, the same year as the final hearing on the parties' divorce.

When Appellant testified, he denied having an affair with *one* particular woman, Claudia Sifuentes. However, when asked about Appellee "put[ting] up with [his] adultery over these years until enough was enough" and filed for divorce, Appellant offered no denial and answered, "If that's what she's saying, ma'am." Evidence submitted by Appellee at trial, absent objection by Appellant, shows Appellee confronting Appellant about his affairs over text message, which he did not deny or rebut but rather told her he loved her and missed her. The same exhibit shows Appellee texted him about "years of infidelity" as being the reason for her filing divorce, which Appellant neither denied nor rebutted, and instead pleaded with her to attend a counseling session with him.

It is well established under Texas law that silence, where a denial or rebuttal or other response would be expected, can serve as an admission when offered by a party-opponent against

the other party. *See Wenk v. City Nat. Bank*, 613 S.W.2d 345, 349 (Tex.Civ.App.--Tyler 1981, no writ). We find Appellant's repeated failure to deny "affairs" and "adultery" when confronted by his wife and at trial, as evidenced by the testimony and the text messages, constitute an adopted admission by Appellant and was properly considered by the trial court in its finding of adultery. Additionally, Appellee testified she was personally contacted by Appellant's girlfriends, including one as recently as less than one year prior to the final divorce hearing, which constitutes at least "some evidence" of Appellant committing adultery during the marriage. *See In the Interest of S.A.A.*, 279 S.W.3d at 855-56.

We find Appellee's testimony regarding being contacted by Appellant's girlfriends, in combination with Appellant's failure to deny allegations of infidelity on multiple occasions including at trial, constitute enough evidence on which the trial court's judgment may rest. To the extent there is conflicting evidence between Appellant's and Appellee's testimony, of which we are not convinced, we presume the trial court, as the trier of fact, resolved the inconsistency in Appellee's favor, as a reasonable person could so do. *Gerges*, 2020 WL 913839, at *3.

We find the trial court did not abuse its discretion in determining Appellant committed adultery and consequently granting Appellee's divorce on those grounds. Appellant's first issue is overruled.

***Deviation from Standard Visitation***

In his second issue, Appellant claims the trial court abused its discretion by "materially deviating" from the Standard Possession Order contained in Texas Family Code section 153.252, and significantly limited his possessory rights to the couple's three children. He references Section 153.253 of the Texas Family Code, which states an order "grant[ing] periods of possession of the child as similar as possible to those provided by the standard possession order" should be entered

where the schedule of either the possessory conservator or child makes the standard possession order "unworkable." Tex.FAM.CODE ANN. § 153.253. Appellant argues the testimony adduced at trial shows he was involved in the lives of his three children and Appellee did not object to the trial court granting Appellant standard possession. Appellant points out Appellee objected to him having possession of the children *every* weekend, but this was not an issue under the Standard Possession Order since it would have granted him possession only on the first, third, and fifth weekends of the month. Appellant claims the trial court effectively cut his weekend possession in half under the Standard Possession Order by limiting it to Saturdays 10:00 a.m. to Sundays at 6:00 p.m., rather than Fridays when he picked the children up after school until he dropped the children off at school on Monday mornings.[1] Appellant asks this Court to vacate and set aside the trial court's judgment regarding possession and remand to the trial court with instructions that Appellant be granted "all of the visitation and possessory rights he is entitled to under the Standard Possession Order."

Appellee counters the possession ordered by the trial court only removed three nights per month from what would have been awarded under the Standard Possession Order as written. Appellee also references evidence elicited at trial regarding Appellant's parenting style, the children's schedules, and Appellant's work schedule, which likely contribute to the trial court's possession determination.

***Standard of Review***

Issues involving custody, possession, and access to children are reviewed under an abuse of discretion standard. *In Interest of J.H. III*, 538 S.W.3d 121, 123 (Tex.App.--El Paso 2017, no

[1] It does not appear that Appellant takes issue with the trial court limiting his possessory time with the children to the first, third, and fifth weekends of the month as prescribed by the Standard Possession Order, despite it being less time than he was granted by the trial court under the temporary possession order.

pet.). Trial courts are given substantial latitude to determine such matters. *See, generally, In re Doe 2*, 19 S.W.3d 278, 281 (Tex. 2000). In assessing whether an abuse of discretion occurred, we make a two-pronged analysis: (1) whether the trial court had sufficient information to exercise its discretion; and (2) whether it erred in applying its discretion to the case at issue. *Gerges*, 2020 WL 913839, at *3, (*citing In re T.M.P.*, 417 S.W.3d 557, 562-63 (Tex.App.--El Paso 2013, no pet.).

As with the prior issue, challenges to the legal and factual sufficiency of the evidence are factors we use to determine whether sufficient evidence was presented to the trial court and relied upon by it in exercising its discretion, but are not independent grounds of error. *See Norris v. Norris*, 56 S.W.3d 333, 338 (Tex.App.--El Paso 2001, no pet.); *In Interest of C.M.V.*, 479 S.W.3d 352, 358 (Tex.App.--El Paso 2015, no pet.). Evidence is considered in the light most favorable to the trial court's finding if reasonable to do so, and evidence contrary to the finding is disregarded unless a reasonable fact finder could not. *In re T.M.P.*, 417 S.W.3d at 563, (*citing City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005)). Only a finding "so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust" will be set aside. *Gerges*, 2020 WL 913839, at *3, (*citing In re T.M.P.*, 417 S.W.3d at 562). Where evidence presented by the parties is inconsistent, "we must presume that the fact finder resolved the inconsistency in favor of the order if a reasonable person could do so." *Id.*

The trial court, as the finder of fact, is "in the best position to observe the witnesses and their demeanor[.]" *Id.* Thus, where "substantive and probative" evidence exists supporting its findings, no abuse of discretion occurred. *Id.*, (*citing In re T.M.P.*, 417 S.W.3d at 562-63). As with other questions regarding the trial court's exercise of discretion, only if it acted "arbitrarily or unreasonably, without reference to any guiding principles, or if it otherwise failed to correctly

analyze the law" will we find an abuse of discretion occurred. *Id.*, (*citing In re T.M.P.*, 417 S.W.3d at 562).

***Analysis***

Issues regarding access to children require the trial court to consider first and foremost the best interest of the child. *See* TEX.FAM.CODE ANN. § 153.002. In making this determination, courts consider a non-exhaustive list of concerns set forth by the Texas Supreme Court in *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976), frequently referred to as the "*Holley* factors." *Gerges*, 2020 WL 913839, at *2. The *Holley* factors include:

> (1) the desires of the child, (2) the emotional and physical needs of the child now and in the future, (3) the emotional and physical danger to the child now and in the future, (4) the parental abilities of the individuals seeking custody, (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 or by the agency seeking custody, (7) the stability of the home or proposed placement, (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.

*Id.*, (*citing Holley*, 544 S.W.2d at 371-72). Other concerns in making custody determinations are ensuring the children have "frequent and continuing contact" with parents who act in their best interests; providing "safe, stable, and nonviolent environment[s]" in which the children reside; and "encourag[ing] parents to share in the rights and duties of raising their child[ren]" after they are no longer married. *Gerges*, 2020 WL 913839, at *3, (*citing* TEX.FAM.CODE ANN. §153.001(a)(1)-(3)).

Section 153.312 of the Texas Family Code states, in pertinent part, the possessory conservator who lives 100 miles or less from the child's primary residence has the right to the child:

> (1) on weekends throughout the year beginning at 6 p.m. on the first, third, and fifth Friday of each month and ending at 6 p.m. on the following Sunday; and

(2) on Thursdays of each week during the regular school term beginning at 6 p.m. and ending at 8 p.m., unless the court finds that visitation under this subdivision is not in the best interest of the child.

TEX.FAM.CODE ANN. § 153.312(a). A conservator may elect to alter the standard possession order, including having the weekend periods of possession begin when the child is released from school on Friday and end when school resumes the following week. *See Gerges*, 2020 WL 913839, at *4, (*citing* TEX.FAM.CODE ANN. § 153.317(a)). However, the trial court may not allow an alteration if it is deemed not to be in the child's best interests. *Id.*, (*citing* TEX.FAM.CODE ANN. §153.317(a)). The first temporary order granted Appellant standard possession in accordance with Section 153.311-153.315 of the Texas Family Code. The trial court subsequently modified those temporary orders on July 28, 2017, allowing Appellant access each weekend from 10:00 a.m. Saturday until 6:00 p.m. Sunday. The order reflects the trial court interviewed all three of the children on July 25, 2017, before modifying the temporary orders. In addition, the trial court's modification order provided Appellant could not sleep in the bedroom with the minor boys at night and the parties were to honor the children's sports/activity schedule. The children, at the time of the divorce, were fifteen, thirteen, and twelve years' old. The youngest played football. They also enjoy playing video games.

Both parties testified at the final hearing regarding their preferences for possession of the children. Appellee testified she wanted Appellant's visitation with their children to be pursuant to the standard order of every other weekend, despite the temporary order in place granting him visitation every weekend from 10:00 a.m. Saturday until 6:00 p.m. Sunday. Appellee testified she felt it was not in the children's best interests to visit with Appellant each weekend because it was exhausting for them to go back and forth and interfered with their participation in extra-curricular activities or visit with their friends. She testified, on Fridays in particular, the children rushed home

to prepare to spend the weekend with their father which she did not find to be in their best interests. Last, she was unable to spend any weekends with the children.

Appellee testified about concerns she had regarding the time her children spent with Appellant. She told the trial court he was aggressive with them at times in exacting discipline. She was concerned with how Appellant handled an incident when their youngest son got in trouble at school. Appellee stated CPS investigated her husband for masturbating in front of the children while they were in bed with him during one of Appellant's possessory periods. When the children return from spending time with Appellant, Appellee observed they were agitated, angry, combative, and frustrated. There was also testimony Appellant kicked one of their sons in the back for losing one of the child's shoes. Appellee related an incident in which Appellant cursed at and berated one of the children, and spanked him, for accidentally breaking an aquarium while cleaning it. According to Appellee, Appellant often gets angry with the children and physically gets "in their face" when he is upset with them.

At the final hearing, Appellant requested full custody of his children. He testified he is the primary financial provider for them and has enough paid time accrued at work to care for them. He told the trial court his children enjoy spending time with him and he has no need to scream at them or hit him as Appellee testified. He believed it was in the children's best interest for the trial court to award him primary custody and Appellee possession pursuant to the standard possession order "so she can deal with all the stress that she has at work[, a]nd maybe, you know, perhaps catch up on her finances." He denied physically disciplining the children.

When asked about how he spends visitation with his children, Appellant testified they went to the movies, comic stores, Bob-O's, and other places to "keep them [] busy[.]" He sometimes did not work on Fridays and would, occasionally, pick up his children from school, which resulted

in Appellee threatening to call the police for him doing so. He stated if he were awarded custody of the children and able to keep the home, he intended to continue to reside in the family home and keep them in their schools. If not appointed primary conservator, Appellant asked for extended visitation with the children and explained he would adjust his work schedule so extended visitation was feasible. Appellee stipulated to his request for extended standard possession.

Here, Appellant complains the trial court deviated from the visitation allowed by the standard possession order by beginning his weekend possession at 10:00 a.m. on Saturday mornings rather than 6:00 p.m. Friday evenings. He likewise complains the trial court did not honor the stipulated-to request he made for extended visitation. However, we find that the evidence adduced at trial supports the trial court's decision on possession. Specifically, the *Holley* factors implicated in this case include the desires of the child, their physical and emotional needs now and in the future, parenting abilities of the parties, stability of the home where the children would be placed, and acts or omissions of the parent indicating the existing parent-child relationship is improper. *See Gerges*, 2020 WL 913839, at *2, (*citing Holley*, 544 S.W.2d at 371-72).

Although the record does not reflect the desires of the children regarding primary custodian, the trial court, having conferred with them, would be in the best position to consider their preferences. We note that after conferring with the children, the trial court specifically modified overnight visitation from three nights to only one night along with the proviso the children were not to sleep in the same bedroom as the Appellant. Additionally, Appellee's testimony of Appellant's parenting style which included physical discipline and borderline verbal abuse of the children while in his care supports the trial court's deviation from standard possession. Appellee's testimony of the children's emotional state upon returning home as angry and despondent after spending time with their father also supports the trial court's decision. The

children being stressed on Fridays trying to rush to get to Appellant's residence after school provides for evidence that the best interest of the children was a modified possession order beginning Saturday mornings. Finally, Appellant's changing work schedule could reasonably be expected to cause difficulty in maintaining a stable environment for the children. We find the foregoing evidence and the record supports the trial court's decision to adjust the standard possession order based on the *Holley* factors and the children's best interests. *See Gerges*, 2020 WL 913839, at *5-6.

We find sufficient evidence existed to support the trial court's determination of custody and possession in the instant case and the trial court did not abuse its discretion by deviating from the standard possession order regarding Appellant's possession of the children. We overrule Appellant's second issue.

**CONCLUSION**

A trial court, acting as the trier of fact, has broad discretion to determine matters involving possession and distribution of marital property, including whether fault grounds for divorce affect such distribution. *Id.*, at *3. The mere fact that a court of appeals might decide an issue differently does not establish an abuse of discretion. *Id.* We find the trial court did not abuse its discretion.

Having overruled Appellant's two issues on appeal, we affirm the judgment of the trial court.

July 10, 2020 YVONNE T. RODRIGUEZ, Justice

Before Alley, C.J., Rodriguez, and Palafox, JJ.