In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00114-CV

IN THE INTEREST OF A.M., A CHILD

On Appeal from the 446th District Court
Ector County, Texas[1]
Trial Court No. B-122,327, Honorable Sara K. Billingsley, Presiding

June 8, 2020

OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

Appellant Carol Armendariz and appellee Daniel Mota are the parents of A.M.[2] In a 2006 order entered in a suit affecting the parent-child relationship, Carol and Daniel were appointed joint managing conservators, and Carol was given the exclusive right to establish the residence of A.M. without regard to geographic location. In 2018, Daniel filed a petition to modify the 2006 order seeking to impose a geographic residency

[1] Originally appealed to the Eleventh Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013).

[2] Because the parties' child is under 18, we will refer to him only by his initials. We will refer to the parties by their first names for the sake of clarity.

restriction to Ector County. Carol filed a counter-petition to modify Daniel's child support obligation. A hearing on these pleadings was conducted in October of 2018 and the trial court granted both requested modifications. On appeal, Carol challenges the geographic residency restriction, the trial court's failure to interview the child, and an alleged conflict of interest relating to Daniel's trial counsel. Because we conclude the trial court did not abuse its discretion, we affirm the trial court's order.

Background

In May of 2018, Carol gave notice to Daniel of her intent to relocate with A.M. from Odessa to Beeville. At that time, Carol and A.M. lived with her parents in Odessa and Carol was employed at Texas Oncology, a job she held for thirteen years. A.M. is twelve years old and has lived in Odessa since his birth. All of A.M.'s extended family lives in Odessa, including his maternal grandparents, paternal grandparents, and a paternal uncle. Daniel lived in Odessa when A.M. was born, moved to Amarillo in 2007 to attend school, and returned to Odessa in 2013.

Daniel is a corporal with the Odessa Police Department, and he is assigned to the traffic unit. Daniel and Lisa have been married almost twelve years, and Lisa has been around A.M. since he was two months old. Daniel and Lisa have two children, M.M., fifteen years old, and D.M., six years old. A.M. and D.M. have a close relationship and share a bedroom when A.M. visits.

In August, Carol and A.M. moved to Beeville and began living with Carol's long-time boyfriend, Roy. Carol described her eight-year relationship with Roy as "off and on." Carol and Roy have plans to marry, although a wedding date had not been set at the time

of trial. Roy has lived in Beeville for six years and owns his home. Carol has no plans to work in Beeville so that she will be available to take A.M. to and from school and his related activities. A.M. is enrolled in school and attends education classes at the Catholic church in Beeville.

Beeville is located approximately four hundred and fifty miles from Odessa—a six-hour drive by automobile. Carol is unwilling to bear the sole responsibility of driving A.M. to and from Odessa for weekend visitations with Daniel because A.M. does not get out of school until 4:00 p.m., which would put them arriving in Odessa at 10:00 to 10:30 p.m. Instead, Carol suggested that the visitation exchange take place two weekends per month in Junction, which is approximately half way between Beeville and Odessa, and that the parties split travel expenses for A.M. to fly to Odessa one weekend per month.[3] Carol admitted that she did not consider the distance between Odessa and Beeville before the move. She also acknowledged that traveling thirteen to fourteen hours for a weekend visitation was not in A.M.'s best interest.

Before A.M. moved to Beeville, Daniel and A.M. had a "very good relationship." They enjoyed collecting action figures and going to the movies. Daniel exercised his designated weekend visits with A.M., usually the first, third, and fifth weekends, plus holiday visits. Occasionally, Carol and Daniel would agree to alter the visitation schedule to accommodate family events.

Daniel described the prospect of A.M. being on the road thirteen to fourteen hours for a weekend visit as "awful." Daniel believes that the distance would affect his visits

[3] The closest major airport to Beeville is located in Corpus Christi. There was no testimony presented about the cost of airline transportation.

with A.M., stating, “I don’t think it’s going to be good for [A.M.] though.” Daniel would like to continue to exercise his first, third, and fifth weekend visitation schedule but, as long as A.M. lives in Beeville, that is impossible “because of [Daniel’s] work schedule.” If Daniel is travelling to pick up A.M. for a visit and received a work-related call, he would have to respond to the call unless he was on vacation. Since extended family members also work, they are not able to drive to Junction to assist with the exchanges.

Since A.M. moved to Beeville, Daniel has had visitation three times. According to Daniel, “my son seems a lot more distant towards me. He also doesn’t seem as happy. This past weekend when we had him, the first few hours were rough.” Before he moved, A.M. was “happy go lucky” and “a riot.” Daniel testified that it was in A.M.’s best interest to be close to his extended family in Odessa.

The trial court granted a residency restriction to Ector County beginning with Daniel’s 2018 Christmas period of possession and increased Daniel’s child support obligation.[4] Carol filed a motion for new trial that was denied after hearing. Carol timely filed this appeal.

Standards of Review

A trial court has broad discretion to decide the best interest of a child in family law matters such as custody, visitation, and possession. Accordingly, we review a decision to modify conservatorship for an abuse of discretion. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982). A trial court may modify a conservatorship order if modification would be in the best interest of the child, and the circumstances of the child, a

[4] The modification of child support was not appealed.

conservator, or another party affected by the order have materially and substantially changed since the date of the rendition of the prior order. TEX. FAMILY CODE ANN. § 156.101(a)(1)(A) (West 2019).[5] We will not disturb a trial court's decision in a modification case unless the complaining party shows a clear abuse of discretion, meaning the trial court acted in an arbitrary and unreasonable manner or without reference to guiding principles. *Echols v. Olivarez,* 85 S.W.3d 475, 477 (Tex. App.—Austin 2002, no pet.). In our review of a modification order under an abuse of discretion standard, legal and factual sufficiency challenges to the evidence are not independent grounds of error, but are relevant factors in assessing whether the trial court abused its discretion. *In re P.M.G.,* 405 S.W.3d 406, 410 (Tex. App.—Texarkana 2013, no pet). An appellate court applies a two-prong analysis when it determines whether legal or factual insufficiency has resulted in an abuse of discretion: (1) whether the trial court had sufficient information upon which to exercise its discretion, and (2) whether the trial court erred in applying its discretion. *Child v. Leverton,* 210 S.W.3d 694, 696 (Tex. App.—Eastland 2006, no pet.). The sufficiency review is related to the first inquiry. If it is revealed in the first inquiry that there was sufficient evidence, then we must determine whether the trial court made a reasonable decision, and that involves a conclusion that the trial court's decision was neither arbitrary nor unreasonable. *Id.* It is not an abuse of discretion if some evidence of a substantive and probative character exists to support the trial court's decision. *Bates v. Tesar,* 81 S.W.3d 411, 424-25 (Tex. App.—El Paso 2002, no pet.).

[5] Further references to provisions of the Texas Family Code will be by reference to "section __" or "§ __."

Because of the fact-intensive nature of reviewing custody issues, an appellate court must afford great deference to the factfinder on issues of credibility and demeanor because the child's and parent's behavior, experiences, and circumstances are conveyed through words, emotions, and facial expressions that are not reflected in the record. *Chavez v. Chavez,* 148 S.W.3d 449, 458 (Tex. App.—El Paso 2004, no pet.).

When, as here, no findings of fact or conclusions of law are made, the reviewing court must presume the trial court made all fact findings necessary to support its judgment. *Garcia v. Gomez,* No. 07-06-00403-CV, 2008 Tex. App. LEXIS 8897, at *3-4 (Tex. App.—Amarillo Nov. 26, 2008, no pet.) (mem. op.) (citing *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 667 (Tex. 1987)). A reviewing court must uphold these implied findings if they are supported by the record and correct under any theory of law applicable to the case. *Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co.*, 223 S.W.3d 1, 21 (Tex. App.—El Paso 2005, pet. denied). In deciding whether some record evidence supports the implied findings, "it is proper to consider only that evidence most favorable to the issue and to disregard entirely that which is opposed to it or contradictory in its nature." *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam) (quoting *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 613 (1950)). However, when the record includes a reporter's record, the sufficiency of the evidence supporting the implied findings of fact may be challenged. *Garcia*, 2008 Tex. App. LEXIS 8897, at *4 (citing *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002)).

In determining conservatorship and possession issues, the best interest of the child shall always be the primary consideration. § 153.002 (West 2014). The trial court should also seek to implement the public policy of this State which is to ensure that a child

has frequent and continuing contact with parents who have shown the ability to act in the best interest of the child; provide a safe, stable, and nonviolent environment for the child; and encourage parents to share in the raising of their child after separation. § 153.001 (West 2014). We review a trial court's best-interest finding by using the well-established *Holley* factors. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976).

When determining the best interest of a child in the relocation context, "no bright-line test can be formulated," as these suits "are intensely fact driven" and require the consideration and balancing of numerous factors. *Lenz v. Lenz,* 79 S.W.3d 10, 18-19 (Tex. 2002). Factors that courts have considered in the relocation context include: (1) the reasons for and against the move; (2) the effect on extended family relationships; (3) the effect on visitation and communication with the non-custodial parent to maintain a full and continuous relationship with the child; (4) the possibility of a visitation schedule allowing the continuation of a meaningful relationship between the non-custodial parent and child; and (5) the nature of the child's existing contact with both parents, and the child's age, community ties, and health and educational needs. *Id.* at 15-16.

Imposition of Geographic Restriction

In her first issue, Carol contends the trial court abused its discretion because insufficient evidence supports the decision to impose a geographic residency restriction to Ector County.

At the modification hearing, the trial court heard evidence that Carol decided to move to Beeville to live with her long-time boyfriend, Roy. She notified Daniel of her impending move in accordance with the parties' order. By the time of the final hearing,

Carol and A.M. had been living with Roy, in Beeville, for three months. Carol testified that she would not have moved to Beeville but for the fact that Roy lives there. Carol cited as additional reasons for the move that she planned to marry Roy, the schools in Beeville are not crowded, and the crime rate is not high. Carol had no plans to further her education or secure a job in Beeville and she did not obtain a pediatrician, an optometrist, or a dentist for A.M. before the move.

Conversely, Daniel's reasons for opposing the move were directed at the impact on close family relationships that A.M. enjoyed in Odessa, the feasibility and logistics of making an exchange in Junction, and the quality of the visits considering the extensive travel required.

The evidence established stability and strong familial ties to Odessa. Since 2006, Daniel has married and established a home in Odessa with his wife and A.M.'s siblings. A.M. has lived in Odessa his entire life and, before the move to Beeville, he saw his extended family members daily or weekly due to their close relationship and close proximity to each other. Just before the move, A.M. and Carol lived with the maternal grandparents. There was testimony from both parties that A.M. was particularly close to his maternal grandfather. The evidence suggests that allowing A.M. to remain in Beeville would negatively impact A.M. since he has a close relationship with Daniel, D.M., his paternal uncle, and his maternal grandfather.

The court heard evidence that a typical weekend visit would involve driving thirteen to fourteen hours, depending on traffic in San Antonio. Carol conceded that, regardless of whether A.M. was driven to Odessa or if he travelled by plane, it would be a difficult

trip. Before the move, Daniel regularly exercised his periods of possession and access. Due to Daniel's work schedule as a police officer, he would no longer be able to continue to exercise his regular possession schedule of the first, third, and fifth weekends per month if A.M. was allowed to live four-hundred-fifty miles away. Daniel explained that the move to Beeville created difficulty in facilitating visitation and impacted his relationship with A.M. and that, so far, he was unable to visit as frequently as he was accustomed. The quality of Daniel's visits would also be affected because A.M. would be travelling a minimum of thirteen hours by automobile for each weekend period of possession.

Relocating A.M. a substantial distance from his father and extended family under the facts in this case does not further the legislative goals set out in the Family Code of assuring frequent and continuing contact with parents and encouraging parents to share in the rights and duties of raising their child.

Considering all of the circumstances, including the uncertainties and lack of specifics in Carol's plan, and deferring to the trial judge's resolution of conflicts and determination of credibility, we conclude that the trial court did not abuse its discretion in imposing a geographical restriction to Ector County. *See Bates*, 81 S.W.3d at 434-35. We further conclude that the trial court had sufficient information upon which to exercise its discretion. *Id.* at 424-25. The trial court could have balanced Carol's reasons for the move and the effects on A.M.'s extended family relationships and visits with Daniel and determined that it constituted a material and substantial change of circumstances and that it was in A.M.'s best interest to reside within the geographical boundary of Ector County. Based on the evidence presented, we cannot say the trial court erred in its application of that discretion. We overrule Carol's first issue.

Interview of Child Under Section 153.009

In her second issue, Carol argues that the trial court erred by failing to interview A.M. who was twelve years old at the time of the hearing. Carol points to an off-the-record discussion between both trial counsel and the judge concerning an interview of the child to support her position that the judge should have sua sponte interviewed the child, even though Carol failed to file an application for the judge to do so.

According to section 153.009(a), the trial court "shall interview in chambers a child 12 years of age or older . . . to determine the child's wishes as to conservatorship" if a party, amicus attorney, or attorney ad litem for the child files an application requesting an interview. § 153.009(a) (West 2014). Although the statute is mandatory and requires a trial court to interview a child on the application of any party, it is not an abuse of discretion to refuse to conduct an interview when there is no application on file. *In re J.L.C.,* No. 11-13-00252-CV, 2014 Tex. App. LEXIS 9772, at *13 (Tex. App.—Eastland Aug. 29, 2014 no pet.) (mem. op.) (citing *Hamilton v. Hamilton*, 592 S.W.2d 87, 88 (Tex. App.—Fort Worth 1979, no writ)). In this case, there is no application for an interview contained in the clerk's record. While the trial court had the discretion to interview A.M. "on [it's] own motion," we reject Carol's contention that the trial court had a duty to do so because of the content of Carol's testimony. § 153.009(a). We overrule Carol's second issue.

Conflict of Interest Due to Prior Representation

In her third issue, Carol complains that Daniel's counsel previously represented Carol in a divorce proceeding. Carol raised this issue in a motion for new trial in March of 2019 alleging that the prior representation constituted a conflict of interest because

"trial counsel was in possession of confidential information which materially disadvantaged" Carol during this modification case. At the hearing on the motion for new trial, the trial court heard evidence that Daniel's counsel represented Carol in an uncontested divorce in 2001 when Carol was married to a man by the last name of Hermosillo. Carol did not provide any evidence to support her contention that Daniel's counsel used confidential information in the present case to Carol's detriment.

The record indicates that Carol had knowledge of a potential conflict as early as July of 2018 when she was served with Daniel's petition to modify. Despite her knowledge, Carol did not file a motion to disqualify Daniel's counsel prior to or at the time of trial. Rather, she waited more than seven months to bring the matter to the court's attention. By failing to timely file a motion to disqualify, Carol has waived her complaint. *Vaughan v. Walther*, 875 S.W.2d 690, 690 (Tex. 1994) (per curiam) (a party who fails to file its motion to disqualify opposing counsel in a timely manner waives the complaint). Carol's third issue is overruled.

Conclusion

Having found no error, we affirm the judgment of the trial court.

Judy C. Parker
Justice