COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

	§	No. 08-21-00025-CV
	§	Appeal from the
IN THE INTEREST OF E.S.S., A CHILD	§	388th Judicial District Court
	§	of El Paso County, Texas
	§	(TC# 2014DCM3505)

O P I N I O N

Appellant Justin Logan Sweet (Sweet) appeals from an order modifying the parent-child provisions of the parties' Final Decree of Divorce pertaining to E.S.S., the child he shares with Appellee Emikoryo Angeles Perkins (Perkins). We affirm.

BACKGROUND

Sweet and Perkins divorced in 2015. Their divorce decree included parent-child provisions pertaining to their only child together, E.S.S. Sweet and Perkins were appointed joint managing conservators with joint rights to make educational decisions. Sweet was awarded the exclusive right to designate primary residence. The decree provided the parties to have equal possession and not pay each other child support until the child was in five-year-old kindergarten and thereafter changing to an extended standard possession order with Perkins paying child support to Sweet. E.S.S. was in private daycare up until its version of kindergarten, during which E.S.S. turned five,

and there was a difference of opinion as to the point at which the possession order would change to the standard. Perkins filed a motion to clarify the order in late 2017 and Judge Leverton clarified that the change in possession should take place in 2018 when E.S.S. was eligible for public school kindergarten.

Soon thereafter, in November of 2017, pleading changed circumstances, Sweet filed a petition to modify the parent-child relationship to grant Sweet the exclusive right to make educational decisions for E.S.S. if the parties could not agree and also to increase the amount of child support Perkins was to pay starting fall 2018. Perkins filed a counter petition to modify the parent-child relationship, also pleading changed circumstances, seeking ongoing equal possession of E.S.S., the exclusive right to make educational decisions for E.S.S. or in the alternative the exclusive right to designate E.S.S.'s primary residence, and child support from Sweet. At the modification hearing in August and September of 2019, both Sweet and Perkins testified to the numerous changes in the circumstances of the parties. Sweet remarried and E.S.S. inherited a stepbrother through that marriage. Perkins remarried and a new baby sister came from that union. Both parties also moved to different homes. Sweet went from being on mobilization orders with the military to working a federal job with regular weekday hours. Sweet testified these changes affected E.S.S. He opined the changes in housing and jobs were material and substantial.

Testimony was elicited showing E.S.S. experienced innumerable changes in her progression in school, in her behavior, and in her growing up. Perkins testified about the impact of these changes on E.S.S. since the divorce as well as the additional negative changes in E.S.S.'s behavior as well as the differences in their relationship once the standard possession schedule, giving rise to her petition for modification.

In November 2020, the trial court issued its order modifying the parent-child relationship. The order established Perkins as the parent with the exclusive right to designate E.S.S.'s primary residence, maintained equal periods of possession, and ordered no child support from one party to the other. The trial court issued findings these modifications were in E.S.S.'s best interest and found there had been materially and substantially changed circumstances since the original order. Sweet moved for a new trial, then requested findings of fact and conclusions of law followed by a notice of past due findings. He received no response and filed a notice of appeal in February of 2021.

ISSUES

In four issues, Sweet contends the trial court abused its discretion by: (1) failing to designate which joint managing conservator has the exclusive right to designate the primary residence of the child; and (2) failing to make findings required by Texas Family Code section 154.130. Further, the evidence is legally and factually insufficient evidence to establish there had been a material and substantial change in the circumstances of a party or the child to support: (3) removing Appellant's exclusive right to designate the child's primary residence; and (4) modifying the orders for possession. We disagree.

STANDARD OF REVIEW

We review a trial court's modification of conservatorship, terms of possession and access, and child support for abuse of discretion, i.e., whether the court acted arbitrarily or without any reference to guiding legal principles. *In re M.V.*, 583 S.W.3d 354, 360 (Tex.App.—El Paso 2019, no pet.).

The legal and factual sufficiency of the evidence are relevant factors in assessing whether the trial court abused its discretion. *Id.* at 361. We ask whether the trial court had sufficient

evidence or information upon which to exercise its discretion. *Id*. In cases where the trial court has not filed findings of fact, we consider the evidence in the light most favorable to the trial court's finding as a reasonable fact finder without ignoring any evidence that a reasonable fact finder could not ignore. *Id.* Appellate courts "will sustain a legal sufficiency or 'no-evidence' challenge if the record shows: (1) the complete absence of a vital fact, (2) the court is barred by rules of law or 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 than a scintilla, or (4) the evidence establishes conclusively the opposite of the vital fact." *Wheeling v. Wheeling*, 546 S.W.3d 216, 223 (Tex.App.—El Paso 2017, no pet.)(citing *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005)). To assess factual insufficiency, we look at whether the trial court's finding is "so against the great weight and preponderance of the evidence as to be manifestly wrong." *Wheeling*, 546 S.W.3d at 223; *see Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001)(per curiam); *Tate v. Tate*, 55 S.W.3d 1, 5 (Tex.App.—El Paso 2000, no pet.).

I. Joint Managing Conservator with Right to Designate Primary Residence

In his first issue, Sweet argues the trial court's modification order should be reversed because it did "not intend to grant [Perkins] the exclusive right to designate E.S.S.'s residence" and maintains that the court was required to grant that right to one party or the other pursuant to Texas Family Code section 153.134.

Sweet's interpretation of the modification order is premised upon the mistaken notion that "order seems to contradict itself" because the court crossed out and initialed a duplicate provision in the order (under a section specifying Perkins' rights and duties as a joint managing conservator) stating that Perkins has the exclusive right to designate E.S.S.'s primary residence. The same order, in the relevant section entitled "Geographic Restriction," indicates "Perkins shall have the

exclusive right to designate the child's primary residence within El Paso County, Texas" then states under what condition the geographic restriction may be lifted. We do not address the applicability of Texas Family Code section 153.134 here because the modification order is clear. There is no evidence that in removing a redundant provision the court intended anything other than what the order clearly specified. Accordingly, we overrule Sweet's first issue.

II. Texas Family Code Section § 154.130 Findings

In his second issue, Sweet argues the trial court failed to make findings as to the amount of child support payments in its order as it required under Texas Family Code 154.130. Specifically, there were no findings regarding the parties' net resources, the percentage of the obligor's resources applied to child support, reasons for departure from guideline amounts, and which parent was the obligor and which was the obligee. While it is true that the court did not make any such findings, it was not required to do so; "[s]ection 154.130 is triggered only when the trial court sets child support." *In re J.D.M.*, 221 S.W.3d 740, 743 (Tex.App.—Waco 2007, no pet.)*; see also In Interest of D.B.*, No. 07-16-00359-CV, 2017 WL 4563996, at *2-3 (Tex.App.—Amarillo Oct. 11, 2017, no pet.)(memo op.); TEX.FAM.CODE ANN. § 154.130(a). Here, no child support payments were ordered to be paid by one party to the other. While it is not to say that a party with equal possession of a child should never pay child support to the other, the trial court acted within its discretion to decide not to award child support payments from one party to the other when granting equal possession. *See e.g.*, *Logsdon v. Logsdon*, No. 02-14-00045-CV, 2015 WL 7690034, at *12 (Tex.App.—Fort Worth Nov. 25, 2015, no pet.)(memo op.); *In re K.L.D.*, No. 12-10-00386-CV, 2012 WL 2127464, at *6 (Tex.App.—Tyler June 13, 2012, no pet.)(memo op.). Accordingly, we overrule Sweet's second issue.

III. Material and Substantial Change in Circumstances

Sweet argues the trial court abused its discretion by removing him as the parent with the exclusive right to designate the child's primary residence and by modifying the possession order because the evidence showing a material and substantial change in circumstances was legally and factually insufficient. Sweet not only alleged materially and substantially changed circumstances in his modification pleadings, but he also testified to materially and substantially changed circumstances at the modification hearing.

Sweet cites to a First District Court of Appeals case to argue "assertions of material and substantial change relevant to a request for change in one aspect of an order do not necessarily constitute a judicial admission of material and substantial change regarding change in another aspect of the order." Citing to *Epps v. Deboise*, 537 S.W.3d 238 (Tex.App.—Houston [1st Dist.] 2017, no pet.). However, in *Interest of A.N.G.*, we explained that "[i]n a modification proceeding, if both parties' [live] claims contain the common essential element of changed circumstances of one or more of the parties, one party's allegation that the essential element is met constitutes a judicial admission." *Interest of A.N.G.*, 631 S.W.3d 471, 479-80 (Tex.App.—El Paso 2021, no pet.). Here, Sweet and Perkins both allege changed circumstances in their cross petitions to modify the parent-child relationship.

We note the recently enacted Texas Family Code section 156.007, stating that filing a motion to modify "based on a material and substantial change of circumstances may not be considered on that basis alone to have admitted a material and substantial change of circumstances regarding any other matter," only applies to motions to modify filed on or after September 1, 2021,[1] which is not the case here. Accordingly, we conclude that based on the changed-

[1] "ADMISSION BY A PARTY OF A MATERIAL AND SUBSTANTIAL CHANGE OF CIRCUMSTANCES IN A MOTION TO MODIFY AN ORDER IN CERTAIN FAMILY LAW CASES, 2021 Tex. Sess. Law Serv. Ch. 227 (H.B. 851) (VERNON'S")("SECTION 3. The changes in law made by this Act apply only to a motion to modify

circumstances allegations in the modification pleadings and the parties' testimony, the trial court acted within its discretion in changing the party to designate the child's primary residence and in modifying the possession order. For these reasons, we overrule Sweet's third and fourth issues.

CONCLUSION

Sweet failed to show that the trial court abused its discretion in striking a duplicative provision from the modification order, in failing to make findings relative to a child support order, in changing the party with the right to designate E.S.S.'s primary residence, and in modifying the possession order. We affirm.

August 19, 2022

YVONNE T. RODRIGUEZ, Chief Justice

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

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that is filed on or after the effective date of this Act. A motion to modify filed before that date is governed by the law in effect on the date the motion was filed, and that law is continued in effect for that purpose. SECTION 4. This Act takes effect September 1, 2021.").