IN THE
TENTH COURT OF APPEALS

No. 10-14-00284-CV

IN THE INTEREST OF A.J.M. AND A.R.M., CHILDREN

From the 378th District Court
Ellis County, Texas
Trial Court No. 80226D

MEMORANDUM OPINION

Bianca Barberena-Torres appeals from a judgment that granted a motion to modify the parent-child relationship which gave Angel Morales the right to establish the domicile of their two children, A.J.M. and A.R.M. *See* TEX. FAM. CODE ANN. § 156.101 (West 2014). Bianca complains that the trial court abused its discretion by finding that a material and substantial change had occurred and that the modification was in the best interest of the children. Because we find no reversible error, we affirm the judgment of the trial court.

FACTS

An order was entered in April of 2011 which named Bianca and Angel joint

managing conservators of A.J.M. and A.R.M., who were ages 3 and 1 at that time, with Bianca having the right to establish the children's domicile within Ellis and any contiguous counties. In January of 2014, Bianca, A.J.M., and A.R.M. moved to Georgia to live with Bianca's new husband, who was stationed there by the military. Angel filed a motion for enforcement alleging that Bianca had violated the court's order by moving to Georgia in January of 2014 without prior notice. Bianca filed a petition to modify the parent-child relationship in February of 2014 seeking to remove the geographical restriction; however, she withdrew her petition immediately prior to the final hearing.

In March of 2014, a hearing was conducted on Angel's motion for enforcement and the trial court found Bianca in contempt of the order and granted Angel the temporary right to establish the children's domicile. Bianca was ordered to pay $50 per month in child support. Later that month, Angel filed a counter-petition to modify the parent-child relationship seeking to have the permanent right to establish the children's domicile.

Shortly after the hearing in March, Bianca returned to Texas and moved back into her mother's residence in Ellis County, where she had been residing prior to her move to Georgia. Bianca testified that she did not intend to move out of Ellis County again and that her husband was being reassigned to Fort Hood to where he would commute from Ellis County. Bianca testified that they intended to buy a house in Waxahachie. Bianca's husband was still stationed in Georgia at the time of the final

hearing, however.

Bianca had made a lump sum payment of $150 in June but had not made her July payment prior to the final hearing on July 9. Bianca was working on a cash basis part-time at a convenience store and stated that she did not have the funds to make the child support payment, although she was a nurse and had the ability to earn more income. Bianca did not want to get a permanent job until the proceedings were completed because she needed to attend court hearings.

Since the order was entered in 2011, Bianca had remarried and had another child. Angel had also remarried and his wife was pregnant at the time of the final hearing. The children, ages 5 and 7 at the time of the final hearing, were both enrolled in school.

Bianca alleged that one of the children had scratches on his back when she picked him up for a visitation and that the children had on clothing that was dirty, had holes in it, and was too tight. Approximately thirty days before the final hearing, a report was made to CPS regarding the scratches and lack of feeding of the children but was ruled out. Bianca further complained that Angel refused to communicate with her about the children, which Angel denied.

Angel testified that the children were doing well at his home. Bianca's mother and friend testified that prior to Bianca leaving Texas, they were able to have regular contact with the children, which stopped when she moved to Georgia.

After the hearing, the trial court granted Angel's motion to modify and named

him the conservator with the exclusive right to establish the domicile of the children in Ellis and contiguous counties. Bianca complains that the trial court abused its discretion by granting the modification as requested by Angel.

STANDARD OF REVIEW

A trial court may modify a conservatorship order if the "circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed" since the time of the rendition of the divorce decree and if modification is in the child's best interest. TEX. FAM. CODE ANN. § 156.101(a)(1)(A). A court's determination of whether a material and substantial change of circumstances has occurred is not based on rigid rules and is fact-specific. *Zeifman v. Michels*, 212 S.W.3d 582, 593 (Tex. App.—Austin 2006, pet. denied). Material changes may be established by either direct or circumstantial evidence. *In re T.M.P.*, 417 S.W.3d 557, 564 (Tex. App.—El Paso 2013, no pet.). They have included (1) the marriage of one of the parties, (2) poisoning of a child's mind by one of the parties, (3) a change in home surroundings, (4) mistreatment of a child by a parent or step-parent, or (5) a parent's becoming an improper person to exercise custody. *Id*. (*citing In re A.L.E.*, 279 S.W.3d at 429). Whether a particular change is material and substantial depends on the circumstances of each case. *In re T.M.P.*, 417 S.W.3d at 564.

A trial court's decision to modify a joint managing conservatorship is reviewed for a clear abuse of discretion. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *see*

also Blackwell v. Humble, 241 S.W.3d 707, 715 (Tex. App.—Austin 2007, no pet.). The abuse of discretion standard overlaps with traditional sufficiency standards of review in family law cases, creating a hybrid analysis. *Zeifman*, 212 S.W.3d at 587-88. The reviewing court therefore engages in a two-pronged inquiry to decide whether the trial court abused its discretion: (1) whether the trial court had sufficient information upon which to exercise its discretion; and (2) whether the trial court erred in the application of its discretion. *Echols v. Olivarez*, 85 S.W.3d 475, 477-78 (Tex. App.—Austin 2002, no pet.). The focus of the first inquiry is the sufficiency of the evidence. *Zeifman*, 212 S.W.3d at 588. The reviewing court must then decide whether, based on the evidence before it, the trial court made a reasonable decision. *Id*. As a result, legal and factual sufficiency are not independent grounds of error in modification cases; rather, they are relevant factors in deciding whether the trial court abused its discretion. *In re T.M.P.*, 417 S.W.3d at 562.

To determine whether there is legally sufficient evidence, we consider the evidence in the light most favorable to the trial court's findings, crediting favorable evidence if a reasonable factfinder could and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). When reviewing the evidence for factual sufficiency, we consider and weigh all the evidence presented and will set aside the trial court's findings only if they are so contrary to the overwhelming weight of the evidence such that they are clearly wrong

and unjust. *Id*. at 822. When the evidence conflicts, we must presume that the factfinder resolved any inconsistencies in favor of the order if a reasonable person could do so. *Id*. at 821. The trial court does not abuse its discretion if evidence of a substantive and probative character exists in support of its decision. *Zeifman*, 212 S.W.3d at 587. The trial court is in the best position to observe and assess the witnesses and their demeanor, and an appellate court must give "great latitude" to the trial court in determining the best interest of a child. *In re A.L.E.*, 279 S.W.3d 424, 427 (Tex. App.—Houston [14th Dist.] 2009, no pet.). As a result, the mere fact that an appellate court might decide the issue differently than the trial court does not establish an abuse of discretion. *Zeifman*, 212 S.W.3d at 587.

SUBSTANTIAL AND MATERIAL CHANGE

In her first issue, Bianca complains that the evidence was legally and factually insufficient for the trial court to have found that there was a substantial and material change in the children's circumstances, and therefore the trial court abused its discretion by finding that there had been such a change. Bianca argues that because she was residing with her mother at the time of the entry of the prior order and at the time of the final hearing, there was insufficient evidence regarding a change in residence. Further, Bianca argues that her remarriage and third child do not constitute a substantial and material change because Angel has also remarried and his wife was then pregnant.

This Court has held that the remarriage of a parent can constitute a material change in circumstances. *See In re S.R.O.*, 143 S.W.3d 237, 244 (Tex. App.—Waco 2004, no pet.) (holding the remarriage of a parent can constitute a material change of circumstances); *In re C.Q.T.M.*, 25 S.W.3d 730, 735 (Tex. App.—Waco 2000, pet. denied) (same). The fact that both parties have remarried is evidence of a material and substantial change in circumstances.

Additionally, the trial court heard evidence of Bianca violating the court's orders on more than one occasion, first by moving without prior notice and second by failing to timely pay her child support. Bianca could not even afford $50 per month in child support because she chose to work part-time. Bianca's husband was stationed at an Army post in Georgia and was allegedly moving to Texas where Bianca contended that he would commute daily to Fort Hood in Killeen so that they could live in Waxahachie, which the trial court could have found to not be credible or to be unworkable.

Angel had a steady residence with his current wife and the children were attending school and otherwise doing well in his residence. Although there had been some misunderstanding regarding who was allowed to pick up the children for periods of possession, Angel testified that he would follow the court's orders.

We do not find that the evidence was either legally or factually insufficient regarding whether a material and substantial change had occurred. Clearly changes had occurred for both parties, and it was the trial court's duty to determine which

testimony it found to be credible or not. We do not find that the trial court abused its discretion by finding that a material and substantial change had occurred sufficient to warrant a modification. We overrule issue one.

BEST INTEREST

Bianca complains in her second issue that the trial court abused its discretion by finding that the modification was in the best interest of the children because the evidence was legally and factually insufficient for the trial court to have made such a finding. In determining the best interest of a child, courts consider the following non-exhaustive factors:

> (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 individual seeking custody;
>
> (5) the programs available to assist the individual to promote the best interest of the child;
>
> (6) the plans for the child by the individual or by the agency seeking custody;
>
> (7) the stability of the home or proposed placement;
>
> (8) the acts or omissions of the parent, or potential conservator, that may indicate that the existing relationship is not a proper one; and
>
> (9) any excuse for the acts or omissions of the parent or potential conservator.

Holley v. Adams, 544 S.W.2d 367, 371-72 (Tex. 1976); *see also In re Doe 2*, 19 S.W.3d 278, 282 n.20 (Tex. 2000) (recognizing that intermediate appellate courts use *Holley* factors to ascertain best interest of child in conservatorship cases). Not every factor must be present for the evidence to be sufficient.

Bianca argues that the evidence presented at the final hearing established that it was in the best interest of the children that the children be placed with her. This is because there was testimony regarding the children participating in baseball while residing with her but not while residing with Angel and because her communication with the children had been limited since they were residing with Angel. Bianca further argues that her decision to move the children to Georgia to be with her husband did not make her less stable than Angel, and when it became an issue she moved back to Texas to live with her mother and would not move again out of Ellis County.

Angel argues that the evidence showed that there was no excuse for Bianca's acts in moving the children without prior notice to Angel in violation of the trial court's order. Additionally, Bianca further violated the trial court's order by failing to pay child support when ordered, even though the amount ordered was nominal. Further, Angel contends that Bianca's claims regarding her husband potentially being reassigned to Fort Hood, Bianca and her husband intending to buy a house in Waxahachie, and her husband commuting daily demonstrate that she did not have a stable residence or plan for the future regarding where she and the children would reside.

After reviewing the record, we hold the trial court had sufficient evidence before it to determine the best interest of the children and, based upon its discretion and the applicable law, the trial court did not err in applying this discretion. We overrule issue two.

CONCLUSION

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

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed March 10, 2016
[CV06]