

Opinion filed May 10, 2018



In The  
**Eleventh Court of Appeals**

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No. 11-17-00267-CV

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**IN THE INTEREST OF S.G.M., A CHILD**

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**On Appeal from the 39th District Court  
Haskell County, Texas  
Trial Court Cause No. 12265**

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**MEMORANDUM OPINION**

B.M. challenges the trial court's denial of her petition to modify the parent-child relationship. In her sole issue on appeal, B.M. contends that the trial court abused its discretion when it found that it was in the child's best interest to allow Appellee, J.M., to continue to have the right to determine their child's primary residence. We affirm.

B.M. and J.M. were divorced in April 2016. The trial court appointed both B.M. and J.M. as joint managing conservators of their child, S.G.M. Following a

jury trial, the trial court granted J.M. the exclusive right to designate S.G.M.'s primary residence without regard to geographic location. In October 2016, B.M. filed a motion for enforcement, in which she alleged that J.M. had violated various terms of the final decree of divorce. A month later, J.M. filed a "Petition to Modify Parent-Child Relationship, Counter-Motion for Enforcement, and Request for Temporary Orders After Hearing." In that filing, J.M. alleged that "[t]he circumstances of the child, a conservator, or other party affected by the order to be modified have materially and substantially changed." In February 2017, B.M. filed a counter-petition to modify the parent-child relationship, in which she alleged that circumstances had changed such that the trial court should award her the right to designate S.G.M.'s primary residence.

Following a hearing, the trial court, among other things, denied B.M.'s counter-petition to modify the parent-child relationship because "the relief requested . . . is not in the best interest of the child." Pursuant to B.M.'s request, the trial court entered findings of fact and conclusions of law. Among its other findings, the trial court stated that "there had been a material and substantial change in the circumstances of [B.M.]." The trial court also stated that "it was in the best interest of [S.G.M.] to continue to reside with . . . [J.M.] as the parent with the exclusive right to determine [S.G.M.'s] primary residence."

We review the findings of a trial court in a conservatorship case under the ordinary legal and factual sufficiency standards. *In re A.L.H.*, 515 S.W.3d 60, 80 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). However, challenges to the sufficiency of the evidence are not independent grounds of error in custody cases but, instead, are relevant factors used to determine whether the trial court abused its discretion. *In re M.C.M.*, No. 11-13-00375-CV, 2014 WL 3698283, at \*4 (Tex. App.—Eastland July 17, 2014, no pet.) (mem. op.). When we review the evidence

for legal sufficiency, we view the evidence in the light most favorable to the finding, crediting favorable evidence if a reasonable factfinder could, and disregarding contrary evidence unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 822, 827 (Tex. 2005). In a factual sufficiency review, we must examine the entire record and set aside a finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *In re A.L.H.*, 515 S.W.3d at 80. The factfinder is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *City of Keller*, 168 S.W.3d at 819. In conducting our review, we may not substitute our judgment for that of the factfinder even if we would reach a different answer on the same evidence. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998).

We review a trial court's order on a motion to modify conservatorship for abuse of discretion. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982); *Nichol v. Nichol*, No. 07-12-00035-CV, 2014 WL 199652, at \*2 (Tex. App.—Amarillo Jan. 15, 2014, no pet.) (mem. op.). When we review a trial court's decision for abuse of discretion, we determine whether the trial court acted without reference to any guiding rules or principles or, alternatively, whether the trial court's actions were arbitrary and unreasonable based on the circumstances of the case. *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 315 S.W.3d 28, 31 (Tex. 2010) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)). The fact that a trial court may decide a matter within its discretion in a different manner than an appellate court in a similar circumstance does not demonstrate an abuse of discretion. *Downer*, 701 S.W.2d at 242.

A trial court may modify a prior conservatorship order if modification would be in the best interest of the child and the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since

the rendition of the prior order. TEX. FAM. CODE ANN. § 156.101(a)(1)(A) (West 2014). The findings of a trial court on modification of conservatorship shall be based on a preponderance of the evidence. *Id.* § 105.005.

The best interest of the child is the primary consideration in determining issues that concern conservatorship and possession of or access to a child. *Id.* § 153.002. A court may use a number of factors to determine best interest. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). Those factors, which are not exhaustive, 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 individual who seeks 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 who seeks custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent that 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.* In the context of a custody modification, other factors to consider include the child’s need for stability and the need to prevent constant litigation in child custody cases. *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000).

On appeal, B.M. argues that the trial court erred when it found that it was in S.G.M.’s best interest to continue to reside with J.M. and to allow J.M. to exclusively determine S.G.M.’s primary residence. At trial, B.M. called a number of witnesses to support her contention that it was no longer in S.G.M.’s best interest to reside with J.M. Kayla Edwards, a friend of B.M., testified about S.G.M.’s appearance and demeanor. Edwards stated that, when she sees S.G.M. on Fridays at the beginning of B.M.’s possession period, S.G.M. is “reserved,” “timid,” and “disheveled.” She also testified that “[a]lmost every time that I have seen her on Fridays, it looks like

her hair has not been washed in several days.” She also testified that, on Saturdays, S.G.M. is “always well-dressed” and “very happy.” B.M.’s stepson, Christopher, testified that he once saw lice in S.G.M.’s hair and that he observed B.M. put lice medication on S.G.M. and pull lice from S.G.M.’s head.

B.M. also testified at trial. She stated that S.G.M. had had lice and that she had treated S.G.M.’s hair with lice medication. B.M. stated that J.M.’s mother put baby powder on S.G.M.’s head for lice treatment. B.M. also testified that S.G.M. “has no dental hygiene,” that S.G.M.’s weight is “becoming an issue,” and that S.G.M.’s grades “are going down.” She also stated that S.G.M. “loves” her stepfather and stepbrother. B.M. testified that J.M. “is an absent father” and that she believes J.M. molested S.G.M. B.M. conceded that, if she were granted the right to determine S.G.M.’s primary residence, the school S.G.M. attends would be different. B.M. also testified that she is undergoing “in vitro fertilization.” She also admitted on cross-examination that J.M. “has taken a more active role in [S.G.M.’s] life.” Finally, B.M. testified that, after her divorce from J.M., B.M. moved more than 100 miles from Haskell—where J.M. lives with S.G.M.—to Plainview.

J.M. also testified at trial. J.M. stated that he never saw lice on S.G.M. J.M. did testify, however, that he had taken S.G.M. to a physician assistant, who diagnosed S.G.M. with an allergy to the sun and told J.M. to use a generic powder for treatment. J.M. admitted that S.G.M. is “struggling” in school, but he said that he has gone to S.G.M.’s school to discuss that matter with the principal of the school. J.M. also stated that, to help with her reading, S.G.M. will “redo papers” and stay after school for tutoring. He believes that S.G.M. is “improving.” J.M. testified that he cleans S.G.M.’s head and washes her hair. J.M. conceded that S.G.M. is “chubby,” but he testified that he has not allowed her to drink Cokes and has encouraged her to eat more vegetables and change her eating habits. J.M. also stated

that S.G.M. has a “lazy eye,” for which she sees a doctor. He acknowledged that he once changed one of S.G.M.’s eye doctor appointments but explained that he did so because it conflicted with her STAAR testing at school.

J.M. testified that he believes B.M. is a bad mother. He testified that B.M. is “selfish” and that she “puts herself first, definitely not [S.G.M.]” He also testified that S.G.M. “cries herself to sleep, telling [J.M.] that she does not want to live with her mom.” Overall, J.M. testified that S.G.M. plays on a local softball team, participates in the county stock show through 4-H, and attends church two nights during the week. He stated that, “under the circumstances, [he] think[s] she’s doing great.” He also testified that he spends “[l]ots of time” with S.G.M.

J.M. also called witnesses to testify. Christina Isbell, who is married to one of J.M.’s good friends and has observed S.G.M., testified that J.M.’s home is “[a] normal home. It’s clean, taken care of.” Isbell testified that S.G.M. is “normal, clean, [and] put together” and that her hair is not “messy,” but, rather, “fixed.” She also stated that S.G.M.’s teeth do not “look nasty.” Isbell also testified that S.G.M. and J.M. “show love and affection for one another” and that S.G.M. is not afraid of J.M. She also stated that she thinks it is best for S.G.M. to stay in Haskell with J.M.

Melody Christian, who lives in Haskell and has known J.M. since he was a child, also testified. Christian stated that J.M. is “[d]ependable” and is “a good man.” She testified that she knows S.G.M. well. When asked to describe S.G.M.’s appearance, Christian testified that S.G.M. was “[j]ust fine. Just a normal child.” She also stated that S.G.M. does not have dirty teeth and that her clothes do not look disheveled. She described the relationship between S.G.M. and J.M. as “[v]ery good.” Christian testified that, based on her observations, she does not know why it would not be in S.G.M.’s best interest to continue to live in Haskell.

Based on the *Holley* factors and our review of the record, we hold that the evidence is sufficient to support the trial court's finding that it is in S.G.M.'s best interest for J.M. to continue to have the exclusive right to designate S.G.M.'s primary residence. Therefore, we hold that the trial court did not abuse its discretion when it denied B.M.'s request to modify the parent-child relationship. B.M.'s sole issue is overruled.

We affirm the order of the trial court.

JIM R. WRIGHT  
SENIOR CHIEF JUSTICE

May 10, 2018

Panel consists of: Willson, J.,  
Bailey, J., and Wright, S.C.J.<sup>1</sup>

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<sup>1</sup>Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.