Affirmed; Opinion Filed May 18, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00141-CV

IN THE INTEREST OF C.F.M. AND B.C.M., CHILDREN

On Appeal from the 255th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-09-02559

MEMORANDUM OPINION

Before Justices Lang, Myers, and Stoddart
Opinion by Justice Myers

This is an appeal from the modification of child-custody provisions in a divorce decree. The modification changed the location where appellant, Father, was to exercise his supervised visitation with the children from a facility in Dallas, Texas to a facility in Olathe, Kansas. Father brings two issues on appeal contending (1) the evidence was legally insufficient to support the trial court's determination of a substantial and material change of circumstances and (2) the trial court abused its discretion by modifying the judgment.

BACKGROUND

On April 29, 2015, the trial court signed the divorce decree. The decree provided that Mother was sole managing conservator and Father was possessory conservator of the children. The decree stated that Mother would have "the right to designate the primary residence of the children and exclusive right to primary physical possession of the children." The decree did not place any geographic limitations on the children's residence. The decree provided that Father's

visitation with the children would be supervised and would take place at Faith and Liberty's Place Family Center (FLP) in Dallas, Texas, up to one time per week for a maximum of two hours. However, Father did not exercise his visitation with the children at FLP and had not exercised any visitation with the children since July 2012, which was more than two years before the divorce and more than four years before the hearing in this case.

In June 2016, Mother and the children moved to the Kansas City area of Kansas. Mother had a job there, and the children were enrolled in school there. Father then notified Mother he intended to exercise his visitation at FLP in Dallas, per the divorce decree. Mother filed a petition to modify the decree to provide for Father's visitation to take place in Kansas, and Father filed a motion for clarification of the order for possession or access seeking greater specificity in the possession order so it could be enforceable by contempt.[1] The trial court held a hearing on the motions at which Mother testified. Father did not appear at the hearing, and his attorney did not call any witnesses. At the conclusion of the hearing, the trial court granted Mother's motion to modify and denied Father's motion. The court ordered that Father's supervised visitation with the children would take place at The Layne Project, Inc. in Olathe, Kansas. The modification provided that Father would pay all costs associated with his supervised visits.

APPELLATE RECORD

Father requests in this appeal of the modification of the divorce decree's possession order that we consider the testimony from the 2014 divorce trial. We decline to do so. "The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record." TEX. R. APP. P. 34.1. The record of the 2014 divorce trial was not part of either.

[1] Father also filed a motion for enforcement of the divorce decree requesting that Mother be found in contempt of court and jailed for eighteen months. At the hearing on the motions, Father's counsel told the trial court that the possession order in the divorce decree was probably not enforceable by contempt and that he was "relying more on the request that the Court clarify that order so that it could be enforceable by contempt."

A trial court may not consider testimony from a prior proceeding unless the record of the testimony is properly authenticated and entered into evidence. *Guyton v. Monteau*, 332 S.W.3d 687, 693 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *see also In re C.L.*, 304 S.W.3d 512, 515 (Tex. App.—Waco 2009, no pet.) ("A trial judge may not even judicially notice testimony that was given at a temporary hearing in a family law case at a subsequent hearing in the same cause without admitting the prior testimony into evidence." (Quoting *Davis v. State*, 293 S.W.3d 794, 797–98 (Tex. App.—Waco 2009, no pet.))). During the trial of this case, Father asked the trial court "to take judicial notice of the prior proceedings in this matter." The trial court stated, "The Court takes judicial notice of the prior proceedings in this matter." Father did not offer the testimony from the divorce trial into evidence. Because the transcript of the trial testimony from the divorce trial was not entered into evidence in this modification proceeding, the trial court did not take judicial notice of it. Therefore, it was not before the trial court.

Father asks that we "take notice" of the appellate record for the divorce proceeding, which is on appeal in a separate cause before this Court, and he cites to the testimony from the divorce trial. However, because that testimony was not before the trial court in this case, we decline to consider it.

MODIFICATION OF ORDERS FOR POSSESSION AND ACCESS

In his first issue, Father contends the evidence was legally insufficient to support the trial court's finding that there were material and substantial changed circumstances since the divorce decree.[2] Father contends in his second issue that the trial court abused its discretion by modifying Father's visitation to take place in Kansas as opposed to Dallas.

[2] Father's statement of the issue asks, "was there legally and [sic] sufficient evidence." Father does not set forth a standard of review for sufficiency of the evidence. None of Father's arguments assert the evidence is factually insufficient. His prayer is that the "modification order be vacated and rendered that [Mother] is not entitled to the modification that she sought." Father does not request a new trial. Accordingly, we conclude the issue argues only the legal sufficiency of the evidence. *See City of Univ. Park v. Van Doren*, 65 S.W.3d 240, 246 (Tex. App.—Dallas 2001, pet. denied) (issue asserted only legal insufficiency when argument did not include standard of review and prayer requested rendition but not a new trial).

As relevant here, a trial court may modify a conservatorship order only if the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the order was rendered and the modification would be in the child's best interest. TEX. FAM. CODE ANN. § 156.101(a)(1) (West 2014). The party seeking modification bears the burden of establishing a material and substantial change in circumstances. *In re C.H.C.*, 392 S.W.3d 347, 349 (Tex. App.—Dallas 2013, no pet.). "In considering whether a material and substantial change in circumstances has occurred, the trial court compares the evidence of the conditions that existed at the time of the entry of the prior order with the evidence of the conditions that existed at the time of the hearing on the petition to modify." *In re H.N.T.*, 367 S.W.3d 901, 904 (Tex. App.—Dallas 2012, no pet.). Whether circumstances have materially and substantially changed is a fact-specific determination that is not guided by rigid rules. *Zeifman v. Michels*, 212 S.W.3d 582, 593 (Tex. App.—Austin 2006, pet. denied). The trial court's determination must be made according to the "circumstances as they arise." *In re A.L.E.*, 279 S.W.3d 424, 428 (Tex. App.—Houston [14th Dist.] 2009, no pet.). The law does not prescribe any particular method for showing changed circumstances, which may be established by circumstantial evidence. *Id.* at 429.

As a general rule, we give wide latitude to a trial court's decision on custody, control, possession, and visitation matters. *In re C.P.J.*, 129 S.W.3d 573, 576 (Tex. App.—Dallas 2003, pet. denied). We will not disturb a trial court's decision on a motion to modify conservatorship 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 rules or principles. *Zeifman*, 212 S.W.3d at 587. "Per that standard, we cannot interfere with the decision so long as some evidence of a substantive and probative character supports it and the ruling comports with the law." *In re C.M.G.*, 339 S.W.3d 317, 319 (Tex. App.—Amarillo 2011, no pet.) (citing *In re C.R.O.*, 96 S.W.3d 442, 447 (Tex. App.—Amarillo 2002, pet. denied)). We first ask whether the trial court

had sufficient information upon which to exercise its discretion and second whether it erred in applying its discretion. *Zeifman*, 212 S.W.3d at 588. Under an abuse-of-discretion standard, legal and factual sufficiency of the evidence are not independent grounds of error, but rather are relevant factors in assessing whether the trial court abused its discretion. *See Flowers v. Flowers*, 407 S.W.3d 452, 457 (Tex. App.–Houston [14th Dist.] 2013, no pet.).

"Findings of fact in a case tried to the court have the same force and dignity as a jury's verdict upon questions." *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *see In re Davis*, 30 S.W.3d 609, 613 (Tex. App.—Texarkana 2000, no pet.). "The trial court's findings of fact are reviewable for legal (and factual) sufficiency of the evidence by the same standards as applied in reviewing the legal (and factual) sufficiency of the evidence supporting a jury's finding." *Anderson*, 806 S.W.2d at 794. In conducting a legal sufficiency review, we consider the evidence in the light most favorable to the trial court's judgment, disregarding all evidence and inferences to the contrary unless a reasonable factfinder could not do so. *City of Keller v. Wilson*, 168 S.W.3d 802, 810–11, 827 (Tex. 2005). Anything more than a scintilla of probative evidence is legally sufficient to support the trial court's finding. *In re T.D.C.*, 91 S.W.3d 865, 872 (Tex. App.—Fort Worth 2002, pet. denied).

Changed Circumstances

Father argues the evidence did not support the trial court's finding of a material and substantial change of circumstances. The trial court found and concluded that "[t]he relocation of [Mother and the children] to Kansas City, Missouri [sic] constitutes a material and substantial change in circumstances since the *Final Decree of Divorce* was signed." Father asserts that Mother's relocation did not constitute a material and substantial change of circumstances because her move to Kansas City was anticipated at the time of the divorce. Father does not challenge the

trial court's conclusion that the change of location for Father's supervised visitation was in the children's best interest.

Father relies on *In re H.N.T.*, 367 S.W.3d 901 (Tex. App.—Dallas 2012, no pet.), in support of his argument that a parent's relocation after a prior order is not a material and substantial change of circumstances from the prior order when the parent anticipated making the relocation at the time of the prior order. In *H.N.T.*, at the time the parties divorced, the mother lived in Houston. *Id.* at 902. The divorce decree gave the mother the right to designate the children's residence without any geographic restrictions. *Id.* Later, she moved to Grayson County, which was where the father lived. The mother then told the father she was moving back to Houston. The father sued to modify the divorce decree. *Id.* The trial court modified the decree to provide that the children's residence was to be in Grayson County and that if the mother was not residing in Grayson County or the counties contiguous to it, then the father would have the right to designate the children's residence. *Id.* at 903. We concluded,

> Because the original divorce decree does not contain a geographic restriction and at the time it was entered Mother lived in Houston, her desire to move H.N.T. back to Houston does not establish a material or substantial change in circumstances. If anything, it represents an anticipated circumstance because Father knew nothing within the decree prohibited Mother from moving with H.N.T. at anytime to anywhere.

Id. at 905.

Father argues that under *H.N.T.*, there was no change in circumstances in this case because (1) Mother's relocation to Kansas was anticipated by the parties, and (2) the decree's lack of geographic restrictions on the children's residence meant Mother could move anywhere at anytime, so her and the children's move to Kansas was not a changed circumstance. Concerning the first argument, there is no evidence in this record that Mother anticipated relocating to Kansas. She did not testify, nor was she asked, whether she had anticipated moving to Kansas at the time of the divorce trial. Father cites to testimony from the 2014 divorce trial in support of his argument,

but as discussed above, that testimony was not before the trial court, it is not part of the appellate record, and we decline to consider it. Father also asserts that the following statements in Mother's petition to modify establish that Mother anticipated moving back to Kansas at the time of the divorce:

> 1. In November of 2014 a jury awarded Petitioner Sole Managing Conservatorship despite Respondent's request that Petitioner be geographically restricted to Dallas County, Texas. The Court then appointed Petitioner Sole Managing Conservator of the children without a geographic restriction and awarded Respondent supervised possession and access to the children at Faith and Liberty's Place Family Center in Dallas, Texas.
>
> 2. Petitioner exercised her right as Sole Managing Conservator awarded to her under the *Final Decree of Divorce* to designate the primary residence of the children and moved her and the children the subject of this suit to . . . Prairie Village, Kansas . . . ;
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> 3. Respondent's right to exercise his possession and access under *Final Decree of Divorce* at Faith and Liberty's Place Family Center is not feasible due to the children no longer residing in Dallas, Texas. Thus, there has been a materially [sic] and substantial change as to the location of Respondent's supervised visits with the children only, and Petitioner denies that any other material and substantial change has occurred as to the parties or children since the jury trial conducted in November of 2014.

We do not see how these statements establish that Mother's relocation to Kansas was anticipated at the time of the divorce. Father also cites to Mother's testimony that the divorce decree contained no geographic restrictions prohibiting her from moving away from Dallas, and he argues this testimony establishes that Mother had contemplated moving to Kansas at the time of the divorce. We disagree. The fact that the divorce decree did not prohibit Mother from moving is not evidence that she anticipated moving at the time of the decree. We conclude Father has not shown the evidence established Mother anticipated relocating to Kansas at the time of the divorce.

Father also asserts there was no change of circumstances because Mother's move was consistent with her not having geographic restrictions on where she designated the children's residence. In *H.N.T.*, we said the mother's move to Houston "represents an anticipated

circumstance because Father knew nothing within the decree prohibited Mother from moving with H.N.T. at anytime to anywhere." This case, however, had characteristics that differentiate it from *H.N.T.* In *H.N.T.*, we observed that the father had been traveling to Houston to visit the children after the divorce, so his having to travel that distance was not a change of circumstances. *See In re H.N.T.*, 367 S.W.3d at 904. In this case, Father's supervised weekly visitation with the children at the time of the divorce was to take place in the same city where the children resided. After Mother moved with the children to Kansas, the round-trip travel time for Mother and the children to drive to Dallas for Father to exercise his weekly visitation at FLP would be sixteen hours per visit. Flying would cost $800 per trip. The travel would require the children to miss sports or other activities. Mother's move to Kansas resulted in these new circumstances that did not exist at the time of the divorce. We conclude *H.N.T.* is distinguishable from this case.

Father also relies on *Hoffman v. Hoffman*, No. 03-03-00062-CV, 2003 WL 22669032 (Tex. App.—Austin Nov. 13, 2003, no pet.) (mem. op.). In that case, the mother and father had an agreed divorce. *Id.* at *1. They both knew at the time of the decree that the mother wanted to move to Pennsylvania. The agreed decree imposed a three-year geographic restriction requiring that the parties not remove the children from Williamson or Travis counties or their contiguous counties. At the end of the three years, the mother announced her intention to move to Pennsylvania with the children. The father then moved to modify the divorce decree to impose the Travis and Williamson counties geographic restriction until the children reached the age of eighteen. The trial court denied the modification, finding there was no material or substantial change in circumstances warranting a modification regarding which parent should have the right to determine the residency of the children. *Id.* at *6. The Austin Court of Appeals affirmed, stating:

> Next, Robert argues that Kathleen's move to Pennsylvania is itself a material and substantial change and thus warrants a change to the conservatorship order to renew

> the geographic limitation on the children's residence. When Robert and Kathleen divorced, their agreed order clearly contemplated a geographic restriction for only three years. Even though both parties knew at that time that Kathleen desired to return to Pennsylvania, Robert is now seeking to modify that agreement and order. As a result, we must consider the question of whether the evidence is legally and factually sufficient to show that circumstances changed in a material and substantial way when Kathleen decided to move, a decision authorized by the original order.
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> We begin by noting that, because the move to Pennsylvania was contemplated at the time of the original agreement, its eventuality was not a changed circumstance but an anticipated circumstance and addressed in the original agreement. As a result, the move itself cannot be evidence of a material or substantial change in this case.

Id. As discussed above, this case contains no evidence that Mother anticipated relocating to Kansas at the time of the divorce. Therefore, *Hoffman* is not applicable.

We conclude the evidence is sufficient to support the trial court's finding of a material and substantial change of circumstances. We also conclude Father has not shown the trial court abused its discretion by modifying the decree to provide that Father's visitation take place in Kansas. We overrule Father's first and second issues.

CONCLUSION

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF C.F.M. AND B.C.M., CHILDREN	On Appeal from the 255th Judicial District Court, Dallas County, Texas
	Trial Court Cause No. DF-09-02559.
No. 05-17-00141-CV	Opinion delivered by Justice Myers.
	Justices Lang and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Nikki Slaughter McCray recover her costs of this appeal from appellant Stewart Phillip McCray.

Judgment entered this 18th day of May, 2018.