AFFIRMED and Opinion Filed August 14, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00184-CV

IN THE INTEREST OF A.M.C. AND E.N.C., III, CHILDREN

On Appeal from the 330th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-12-21078

MEMORANDUM OPINION

Before Chief Justice Burns[1] and Justices Pedersen, III, and Evans
Opinion by Justice Evans

After a bench trial, Father of A.M.C.[2] and E.N.C., III appeals the trial court's order modifying the 2014 default divorce decree that had awarded him the exclusive right to determine the children's residence within Dallas County and contiguous counties. In relevant part, the trial court's modification order granted Mother the exclusive right to designate the children's primary residence without regard to geographic location and gave Father standard possession of the children. In three

[1] The Honorable David L. Bridges, Justice, participated in the submission of this case, however, he did not participate in the issuance of this opinion due to his death on July 25, 2020. Chief Justice Robert Burns has substituted in for Justice Bridges and has reviewed the record and briefs before the Court.

[2] In his appellate brief filed on July 30, 2019, Father notes A.M.C. would be emancipated in August 2019. He appears to appeal the modification order only with respect to E.N.C., III.

issues, Father generally contends the trial court erred by (1) failing to return the children to him when he returned from military service in Japan, (2) refusing to consider the parties' rule 11 agreement, and (3) giving Mother the right to determine the children's primary residence. In a fourth issue[3], Father asserts the trial court also erred by removing the geographic restriction on Mother's ability to determine the children's residence and by refusing Father's request for time and involvement with children above what the standard possession order provides. For the reasons that follow, we affirm the trial court's order.

BACKGROUND

When Father and Mother were divorced in 2014, the parties were named joint managing conservators of the couple's three children with Father appointed as the conservator with the right to establish the children's residence within Dallas County and contiguous counties absent a signed written agreement lifting the residency restriction. Mother was ordered to pay child support. At the time the parties' divorce became final, Father was active military and stationed locally.

In March 2016, Mother filed her "First Amended Petition to Modify" requesting, among other things, that she be named the conservator with the right to designate the children's primary residence and terminating her child support

[3] Father asserts we should only address the fourth issue if we conclude that his other three issues lack merit.

obligation.[4] Father responded by filing a counter-petition seeking to lift the geographic restriction due to his active military service.[5] The children were interviewed by Dallas County Family Court Services per Father's request. After a contested hearing, the associate judge rendered temporary orders on June 3, 2016 that, in relevant part, prohibited Father from removing the children from Dallas County for the purposes of changing their primary residence. Shortly thereafter, on July 15, 2016, the parties filed a rule 11 agreement with the court. The agreement allowed Father to designate the two younger children's residence anywhere in the continental United States and permitted the couple's seventeen-year-old daughter to live with Mother for four months, when she would turn eighteen. While the agreement provided "Attorney for Mother shall draft the Final Order" in accordance with the agreement, it is undisputed that no final order was rendered on the agreement. Nevertheless, Mother moved for and was granted a nonsuit on her petition to modify on September 26, 2016. Father's counter-petition, however, was never non-suited. A few days after Mother's non-suit, Father moved to Japan for a military assignment. The children lived with Mother while Father was in Japan.

On July 11, 2017, while Father was stationed in Japan, Mother filed a motion to modify once again requesting she be appointed the conservator with the right to

[4] Mother had initially filed a motion to modify in June 2015, but no citation was issued and Father was never served with the pleading.

[5] He later filed an amended counter-petition, but the changes are not relevant to this appeal.

designate the children's residence. She also requested that Father pay child support and provide the children health insurance. On August 14, 2017, Father returned to the U.S from his deployment in Japan and was stationed in Virginia Beach, Virginia.

In September 2017, Father filed another petition to modify to allow him to establish the residence of E.N.C., III outside Dallas County and the contiguous counties. On September 20, 2017, an associate judge rendered a temporary order awarding Mother the right to determine the child's residence within Dallas County and contiguous counties and awarded Father standard possession, permitting Father to exercise possession in Virginia.[6]

After a bench trial, the trial court rendered its final order on the competing petitions to modify. Among other things, the November 12, 2018 order granted Mother's modification petition, awarding her the exclusive right to designate the children's primary residence without regard to geographic location, awarded Father standard possession, and ordered Father to pay Mother child support.

Father requested findings of fact and conclusions of law. The trial court signed findings that, in relevant part, found (1) there had been a material and substantial change of circumstance of the parties and the children; (2) it was in the best interest of the children that the decree be modified to provide Mother have the exclusive right to designate the children's primary residence without geographic

[6] The temporary order also required Father to pay child support.

restriction, and (3) Father, who resides in Virginia, was entitled to possession of the children pursuant to the standard possession order, having failed to elect alternative periods of possession. Father's motion for new trial and/or to reform or modify judgment was denied by order dated January 16, 2019. This appeal followed.

ANALYSIS

We review the trial court's ruling on a petition to modify conservatorship for an abuse for discretion. *See In re S.N.Z.*, 421 S.W.3d 899, 908 (Tex. App.—Dallas, 2014, pet. denied). An abuse of discretion is shown when the trial court acts arbitrarily and unreasonably or without reference to guiding principles. *See In re W.C.B.*, 337 S.W.3d 510, 513 (Tex. App.—Dallas 2011, no pet.). Challenges to the legal and factually sufficiency of the evidence are not independent grounds of reversible error, but are relevant factors to consider when determining whether the trial court abused its discretion. *See In re A.B.P.*, 291 S.W.3d 91, 95 (Tex. App.—Dallas 2009, no pet.). We first review whether the trial court had sufficient evidence upon which to exercise its discretion and then determine whether the trial court abused its discretion in reaching its decision. *See In re S.N.Z.*, 421 S.W.3d at 908.

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 conservator, or another party affected by the order have materially and substantially changed since the date of the rendition of the previous order. *See* TEX. FAM. CODE § 156.101(a)(1)(A). The best interest of the child is always the trial court's primary

consideration when determining conservatorship issues. *See id*. § 153.002. "Best interest" is a term of art encompassing a broad, facts-and-circumstances based assessment to which we accord significant discretion. *See In re Lee*, 411 S.W.3d 445, 460 (Tex. 2013) (orig. proceeding). Among the factors courts may consider are: (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 individuals seeking custody; (5) the programs available to assist these individuals; (6) the plans for the child by these individuals; (7) the stability of the home; (8) the acts or omissions of the parent which 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. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).

To prove the necessary change occurred, Mother must demonstrate what conditions existed at the time of the entry of the prior order and what material conditions have changed in the intervening period. *See In re W.C.B.*, 337 S.W.3d at 514. Material changes can include such things as marriage of one of the parties, change in home surroundings, and a party's hampering of the child's ability to favorably associate with the other parent. *See In re S.N.Z.*, 421 S.W.3d at 909–10.

A. Temporary Orders

In his first issue, Father argues the trial court erred in refusing to return the children to him when he returned from military service in Japan. Referencing sections 153.701 through 153.709 of the family code addressing military duty of a conservator, Father argues that instead of rendering the September 20, 2017 temporary order designating Mother as the conservator with the right to determine the children's primary residence, the court should have ordered that Father continue as the conservator with the right to establish the children's residence in Virginia Beach, Virginia.

In essence, Father complains the court erred by rendering the September 20 temporary order. But it is well-settled that a temporary order is superseded by entry of a final order, thereby rendering moot any complaint about the temporary order. *See In re A.K.*, 487 S.W.3d 679, 683 (Tex. App.—San Antonio 2016, no pet.); *Erlewine v. Erlewine*, No. 03-06-00308-CV, 2007 WL 2462042, at *2 (Tex. App.—Austin Aug. 29, 2007, no pet.) (mem. op) (complaints relating to temporary orders superseded by final order are moot). Accordingly, Father's complaints about the September 20 temporary order and the failure of the associate judge to return the children to him became moot and not subject to appellate review after the trial court rendered its final order on the modification petitions on November 12, 2018.[7] *See*

[7] Father could have appealed the associate judge's temporary order to the district court. *See* TEX. FAM. CODE § 201.015(a)(1). If his appeal was unsuccessful, he could have then sought mandamus review by original proceeding with this Court. *See* TEX. R. APP. P. 52.1 –.11. He did neither.

In re A.K., 487 S.W.3d at 683; *Mauldin v. Clements*, 428 S.W.3d 247, 262 (Tex. App.—Houston [1st Dist.] 2014, no pet.). We resolve Father's first issue against him.

B. Rule 11 Agreement

In his second issue, Father complains the trial court erred in refusing to consider the rule 11 agreement as a written agreement sufficient to lift the residency restriction in the divorce decree automatically. The 2014 decree provided, in relevant part:

> IT IS ORDERED AND DECREED that [Father] shall be designated as the primary custodian of the child, and as such, has the right to establish the residence and domicile of the child within Dallas and the contiguous counties thereto unless both parties agree and sign a written agreement to lift this residency restriction.

Father argues this provision allowing the parties to lift the geographic restriction by written agreement was self-executing and, thus, the restriction was automatically lifted upon the filing of the parties' rule 11 agreement. Father appears to contend he could therefore move the children to Virginia upon his return from Japan as the conservator with the right to designate the children's residence without the court modifying the divorce decree. Before addressing the merits of Father's argument, however, we first question whether the issue is properly before us.

As an appellate court, we review a trial court's ruling or an objection to its refusal to rule. *See* TEX. R. APP. P. 33.1(a)(2); *Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001) (constitutional claim on appeal in

paternity suit waived by failure to raise complaint at trial) (citing *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex.1993)); *Quintana v. CrossFit Dallas, L.L.C.*, 347 S.W.3d 445, 448–49 (Tex. App.—Dallas 2011, no pet.). "Important prudential considerations underscore our rules on preservation. Requiring parties to raise complaints at trial conserves judicial resources by giving trial courts an opportunity to correct an error before an appeal proceeds." *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003). This is called preservation of error and requires that "a party's argument on appeal must comport with its argument in the trial court." *Knapp v. Wilson N. Jones Mem'l Hosp.*, 281 S.W.3d 163, 170 (Tex. App.—Dallas 2009, no pet.); *see* TEX. R. APP. P. 33.1(a)(1). If an issue has not been preserved for appeal, we should not address it because *nothing is presented for our review. See In re R.B.*, 200 S.W.3d 311, 317 (Tex. App.—Dallas 2006, pet. denied) (preservation of error requires a timely objection in the absence of which nothing is presented for appellate court review). Here, Father never raised the issue of whether the rule 11 agreement automatically removed the residency restriction from the decree.

At trial, Father offered the rule 11 agreement into evidence "to go through [sic] Petitioner's state of mind that at that time she was okay with him having custody." The court allowed it on that basis. Importantly, Father never argued the divorce decree was automatically modified by the agreement entitling him to relocate the children to Virginia. In fact, in his live petition, he requests "the right to establish the residence and domicile of the child outside of Dallas County" and

"requests that the court lifts [sic] the previous residency restriction without written, signed agreement of the parties." Accordingly, we conclude this issue presents nothing for our review.

Even assuming the issue was properly preserved, however, we are not persuaded by Father's argument. Conceding there is not a lot of case law on self-executing provisions in a divorce decree, Father cites *In re W.B.B.*, 05-16-00454-CV, 2017 WL 511208, (Tex. App.—Dallas Feb. 8, 2017, no pet.) (mem. op.) as authority for his position. We conclude *In re W.B.B.* is inapposite.

In re W.B.B. involved a divorce decree provision enjoining both parties from allowing a romantic partner stay overnight while that party was in possession of W.B.B. *Id*. at *1. The injunction was to remain in effect until January 31, 2015 or "until a party marries, which ever event comes first." *Id*. at *3. The parties later reached a mediated settlement agreement that was incorporated into an October 24, 2013 order granting the father's motion to modify the divorce decree to provide, among other things, the injunction in the divorce decree would remain in full force and effect, but terminate should the mother get remarried before W.B.B. turned eight years old. *Id*. at *1. The father subsequently moved to hold mother in contempt for violating the injunction. The mother argued that the morality clause became null and void after the father remarried in February 2013. *Id*. at *3. The trial court denied the motion for contempt. *Id*. at *1. We affirmed, concluding the injunction in the divorce decree was unambiguous and terminated if either party remarried before

January 31, 2015. *Id*. at *5. Because the father remarried in 2013, the injunction had already expired and the agreed modification order did not subject the mother to a new injunction. *Id*.

Unlike *In re W.B.B.*, here, there are questions as to whether the parties had an agreement to lift the residency agreement. The rule 11 agreement was never incorporated into a court order and Mother repudiated the agreement in her response to Father's petition to modify. At trial, in response to the question, "When did you first find out that [Mother] never signed off on the rule 11 agreement while you were in Japan?" Father responded, "That wasn't brought to my attention until I came back from Japan, ma'am."

Moreover, as Father acknowledges, the court could not enter an order based on the agreement when consent had been withdrawn. *See In re M.A.H.*, 365 S.W.3d 814, 820 (Tex. App.—Dallas 2012, no pet.) (because party revoked consent regarding agreement on child support, possession and conservatorship of children, before order was rendered on agreement, trial court could not base order solely on revoked agreement). Finally, to the extent Father argues that Mother could not revoke her consent to change the geographic restriction, he has cited no authority for his position and we have found none. We resolve Father's second issue against him.

C. Substantial Change of Circumstances

In his third issue, Father argues the trial court erred in naming Mother as the conservator with the right to determine the children's primary residence at final trial. Specifically, Father contends that "[t]he only change adduced at trial was the irrefutable fact that [Father] while still in the military received a promotion which required him to leave Texas." Citing *In the Interest of L.L.*, No. 04-08-00911-CV, 2010 WL 2403579 (Tex. App.—San Antonio June 16, 2010, pet. denied) (mem. op), he further argues that pursuant to section 156.105 of the family code, his military deployment cannot by itself support the trial court's finding of material and substantial change of circumstances sufficient to justify the court's modification order.

Father testified at trial that he currently was employed by the U.S. Marine Corps and moved to his current residence in Virginia Beach, Virginia in October or September of 2017 pursuant to his military assignment. He anticipated his assignment in Virginia would last one or two more years. He received a default judgment of divorce in 2014 giving him the right to establish the children's primary residence within Dallas County and contiguous counties while he was active military. Father also testified that about two years after the divorce, he was transferred to Japan and the children lived with Mother at her home and paid Father child support. Upon his return from Japan, Father moved to Virginia. Consequently, the children had been residing primarily with Mother since at least 2016. They

visited Father in Virginia Beach the summer of 2018. Father also admitted he was requesting the Court to move the children out of the State of Texas. Except for when they lived in North Carolina from 2001 to 2004 or 2005, the children had not resided anywhere but Texas.

Mother testified that even if Father lived in Dallas, she would still object to him having custody because "he tried to do a lot of underhanded things. I communicate with him regarding things going on with our kids. He doesn't do the same things in return." Mother stated that at the time the decree was rendered, she and Father were cordial and taking the kids out to do things. She further stated the kids were living with her at that time and she did not receive a copy of the default decree until later that year "when I received something in the mail from the attorney general's office." Father, on the other hand, testified that the children were living with him in Richardson from August 2014 through September 2016. Nevertheless, it appears undisputed that the children had not lived with Father for over two years.

Father also testified that he had a fiancée in Texas with whom he stayed when he visited every couple of months. The fiancée lived in a two-bedroom apartment with her eighteen-year-old son, and another, younger, son. Father admitted he brought his children to her apartment to spend the weekends when he was in town and E.M.C. had to sleep on the floor. At the time of trial, Mother was living with A.M.C., E.M.C., her fiancée and their sixteen-month old son. Mother testified that EMC and his new brother had a great relationship.

In addition to the trial evidence, Father's live modification petition alleged a material and substantial change circumstance of the parties since the rendition of the decree he sought to modify. That allegation constitutes a judicial admission that Father cannot dispute. *See In re L.C.L.*, 396 S.W.3d 712, 718 (Tex. App.—Dallas 2013, no pet.) (party's allegation of changed circumstance constitutes judicial admission of common element of changed circumstances of the parties in the other party's similar pleading). Having reviewed the record before the trial court, we are satisfied that there was ample evidence aside from Father's military assignments requiring he live first in Japan, and then in Virginia, to support the trial court's finding of material and substantial change of circumstances.

Under this issue, Father also argues there is no or insufficient evidence that it was in the best interests of the children for the primary conservator to be changed. We do not agree. In addition to the evidence above, testimony revealed that the children had lived in Texas almost all of their lives. Father testified that the children have always gone to school in Duncanville, even when Father lived in Richardson. Father testified he had concerns about E.M.C. staying with Mother stating:

> [H]e needs a man in his life. He needs a father. There are some issues with his behavior at school that need to be addressed. He's one of those boys, he likes to be outside. He likes to be doing things. The only thing he's participating in right now is gymnastics; other than that he doesn't get to go outside. He doesn't do anything now.

Father indicated that he invested and spent more time with E.M.C. and that they had "a bond that's unbreakable." Father also further stated that if the court granted him

the ability to determine where E.M.C. resided, he would move him to Virginia Beach where they would reside in a two bedroom apartment. He indicated there was a school "right down from my job" and that he worked with a group of guys that were single fathers.

Mother, however, testified that E.M.C was a well-adapted, very healthy, straight "A" student in third grade. She indicated he was "an all-around kid," very outgoing and very active, who loved gymnastics. Mother thought it would negatively affect E.M.C if he moved away from his siblings, A.M.C. and his baby brother. Mother did admit that E.M.C.'s teacher sent one letter home and that he got in trouble for playing around in school that day. She also admitted she spoke to his teacher about his talking in class when he was not supposed to. She indicated that the children were close to both parents. Lastly, there was evidence that Father had not complied with prior court orders regarding discovery in the case and as of the time of trial, he had yet to sign a transfer document to Mother for the couple's home as ordered in the 2014 divorce decree. Based on the record before us, the trial court did not abuse its discretion in concluding that the modification was in the best interests of the children. We resolve Father's third issue against him.

D. Motion for New Trial/Reform the Judgment

In his fourth issue, Father complains that the trial court erred in lifting the geographic restriction on the children's residence and refusing Father's request for more time and involvement with the children after Father notified the court in his

post-trial motion that he had moved back to Dallas. We review the denial of motion for new trial or to reform the judgment for an abuse of discretion. *See McCullough v. Scarbrough, Medlin & Assocs., Inc.*, 435 S.W.3d 871, 917 (Tex. App.—Dallas 2014, pet. denied) (motion to reform judgment); *Dugan v. Compass Bank*, 129 S.W.3d 579, 582 (Tex. App.—Dallas 2003, no pet.) (motion for new trial).

Father contends that based on the new evidence that he moved back to Dallas, the trial court should have granted his motion for new trial. Contrary to Father's assertion, however, the fact that Father chose to move back to Dallas after the trial, is not "newly discovered material evidence" but simply new facts that did not exist at the time of trial.

Father also sought to reform the trial court's order arguing that because Mother never specifically requested the residency restriction's removal in her pleadings, the trial court erred in eliminating it. But Father ignores the fact that he requested the residency restriction be lifted in his petition to modify. Moreover, at the time of trial, father was living in Virginia. Consequently, there was no reason to maintain the children's residence in this area.

Finally, Father complains the trial court erred in refusing his request in the motion to reform for an expanded possession schedule if it did not grant the motion for new trial. However, in its findings of fact, the trial court specifically found that Father failed to elect alternative periods of possession. Having failed to challenge this finding, it is binding on appeal unless the contrary is established as a matter of

law or there is no evidence to support the finding. *See Sheetz v. Slaughter*, 503 S.W.3d 495, 505 (Tex. App.—Dallas 2016, no pet.). Because Father has not shown conclusively he requested an expanded possession schedule prior to rendition of the trial court's order, the trial court did not err in denying Father's request in his motion to reform.

CONCLUSION

Based on the record before us, we affirm the trial court's November 12, 2018 Order in Suit to Modify Parent-Child Relationship.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF A.M.C. AND E.N.C., III, CHILDREN,	On Appeal from the 330th Judicial District Court, Dallas County, Texas Trial Court Cause No. DF-12-21078.
No. 05-19-00184-CV V.	Opinion delivered by Justice Evans, Chief Justice Burns and Justice Pedersen, III participating.

In accordance with this Court's opinion of this date, the trial court's November 12, 2018 order in suit to modify parent-child relationship is **AFFIRMED**.

It is **ORDERED** that appellee Lameka Colclough recover her costs of this appeal from appellant Elijah Colclough, Jr.

Judgment entered August 14, 2020.