Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00049-CV

IN THE INTEREST OF J.R.L. and V.R.L., Minor Children

From the County Court at Law No. 1, Webb County, Texas
Trial Court No. 2016CVG000221-C1
Honorable Hugo Martinez, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Luz Elena D. Chapa, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: May 20, 2020

AFFIRMED

Appellant Viridiana[1] appeals the trial court's January 18, 2019 order granting appellee Josue's petition to modify a previous order in this suit affecting the parent-child relationship ("SAPCR"). We affirm the trial court's order.

BACKGROUND

Viridiana and Josue divorced on May 2, 2016. Their agreed final decree of divorce ("the original SAPCR order") appointed them joint managing conservators of their two children, J.R.L. and V.R.L., and gave Viridiana the exclusive right to designate the children's primary residence. Although Josue, Viridiana, and the children lived together in Laredo for a few months after the

[1] To protect the identity of the minor children, we refer to the children's parents and stepfather by their first names and to the children by their initials. TEX. FAM. CODE ANN. § 109.002(d).

rendition of the original SAPCR order, Josue eventually moved in with his brother. Josue testified that the children stayed with him "most of the time" during that period, but Viridiana testified they were living with her "the entire time." It is undisputed, however, that the children were not separated from each other.

Viridiana married Mario, and she and Mario took J.R.L. and V.R.L. on frequent overnight trips to Guerrero, Mexico to visit Mario's family. Josue was concerned about the children's safety on these trips, and he suspected that Viridiana and Mario planned to move to Mexico permanently. He also noted that Viridiana did not appear to have a stable residence and seemed to move frequently. On July 14, 2017, Josue filed a petition to modify the original SAPCR order and requested the exclusive right to determine the children's primary residence. In August of 2017, Viridiana gave birth to her first child with Mario.

After Josue filed the modification petition, Viridiana moved with the children to Rio Grande City, Texas, approximately two hours away from Laredo. J.R.L., who was starting middle school at that time, did not thrive in his new home in Rio Grande City. His grades fell, he missed his friends and family in Laredo, and he did not get along with Mario. As a result, in September of 2017, Viridiana—who still had the exclusive right to designate the children's residence—agreed to let J.R.L. return to Laredo to live with Josue. However, V.R.L. adjusted well to the relocation, and she remained in Rio Grande City with Viridiana. After J.R.L. returned to Laredo, the children saw each other only on weekends. In 2018, Viridiana gave birth to her second child with Mario.

On November 30, 2018, Josue amended his modification petition to allege that the parties' circumstances had materially and substantially changed since the original SAPCR order because Viridiana had remarried, moved to a new city, and given birth to two new children. He also noted that J.R.L. had been living with him since September of 2017. He alleged that it was in both

J.R.L.'s and V.R.L.'s best interest to modify the original SAPCR order to grant him the right to designate their primary residence.

The parties tried Josue's modification petition to the bench in 2018. The trial court heard testimony from Viridiana, Josue, Josue's brother, and Josue's father. It also heard argument from J.R.L. and V.R.L.'s attorney ad litem, Armando Lopez, who interviewed both children multiple times. Finally, the court considered two social study reports prepared by investigator Judy Jordan. On January 18, 2019, the trial court signed an order granting Josue's petition to modify the original SAPCR order and giving Josue the exclusive right to designate the children's primary residence. This appeal followed.

ANALYSIS

Standard of Review

"Because conservatorship determinations are intensely fact driven, the trial court is in the best position to observe the witnesses and feel the forces, powers, and influences that cannot be discerned by merely reading the record." *In re J.S.P.*, 278 S.W.3d 414, 418–19 (Tex. App.—San Antonio 2008, no pet.) (internal quotation marks and citation omitted). Trial courts therefore have broad discretion in matters regarding custody, visitation, and possession of children, and we will not reverse a trial court's order modifying the terms and conditions of conservatorship absent a clear abuse of that discretion. *In re V.R.G.*, No. 04-17-00583-CV, 2018 WL 842766, at *1 (Tex. App.—San Antonio Feb. 14, 2018, no pet.) (mem. op.). A trial court abuses its discretion when it acts arbitrarily or unreasonably. *Id.* A trial court does not abuse its discretion if some evidence of a substantive and probative character supports its decision. *In re Guardianship of C.E.M.-K.*, 341 S.W.3d 68, 80 (Tex. App.—San Antonio 2011, pet. denied). Because the trial court did not file findings of fact and conclusions of law, we must presume it made all of the findings of fact

necessary to support its judgment. *Roberts v. Roberts*, 402 S.W.3d 833, 838 (Tex. App.—San Antonio 2013, no pet.).[2]

Under the abuse-of-discretion standard, challenges to the legal and factual sufficiency of the evidence are not independent grounds of error, but are factors to be considered in determining whether the trial court abused its discretion. *Id.* When an appellant challenges the legal and factual sufficiency of the evidence under this standard, we consider: (1) whether the trial court had sufficient information on which to exercise its discretion; and (2) whether the trial court erred in exercising its discretion. *In re T.K.D.-H.*, 439 S.W.3d 473, 481 (Tex. App.—San Antonio 2014, no pet.). "In determining whether the trial court had sufficient information, we use the traditional standards of review for legal and factual sufficiency." *Id.* "Once we determine whether sufficient evidence exists, we must then decide whether the trial court's decision was reasonable." *In re Guardianship of C.E.M.-K.*, 341 S.W.3d at 80.

When a party challenges the legal sufficiency of an adverse finding on which she did not have the burden of proof at trial, she must demonstrate that no evidence supports the challenged finding. *See Zeifman v. Michels*, 212 S.W.3d 582, 588 (Tex. App.—Austin 2006, pet. denied). We must consider the evidence favorable to the finding if a reasonable factfinder could, disregard any contrary evidence unless a reasonable factfinder could not, and indulge every reasonable inference in favor of the finding. *In re Guardianship of C.E.M.-K.*, 341 S.W.3d at 80–81. "The ultimate test for legal sufficiency is whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Id.* at 81.

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[2] Although Viridiana requested findings of fact and conclusions of law, she did not file a notice of past-due findings as the Texas Rules of Civil Procedure require. *See* TEX. R. CIV. P. 297. Because she did not properly request findings and conclusions and none were signed, we must affirm the judgment on any legal theory supported by the evidence. *See Narvaez v. Maldonado*, 127 S.W.3d 313, 319 (Tex. App.—Austin 2004, no pet.).

When an appellant challenges the factual sufficiency of an adverse finding on which she did not have the burden of proof, she must demonstrate that the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *Zeifman*, 212 S.W.3d at 589. In reviewing a complaint of factual insufficiency, we consider all of the evidence in the record, but we may not merely substitute our own judgment for that of the trier of fact. *Id.* at 588–89.

Material and Substantial Change

Viridiana primarily argues that the evidence is legally and factually insufficient "to support the conclusion that circumstances had materially changed so as to require a change in the conservatorship of the children." As support for this argument, she contends "there wasn't sufficient evidence to prove that [she] was being negligent toward the children." However, Josue was not required to show that Viridiana was negligent or unfit to obtain a modification of the original SAPCR order. *See Epps v. Deboise*, 537 S.W.3d 238, 249 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Instead, he was required to show that "the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since" the rendition of the previous order and that modification would be in the children's best interest. TEX. FAM. CODE ANN. § 156.101(a)(1).

Whether a material and substantial change occurred is a fact-specific determination that is not controlled by rigid or definite rules. *In re T.W.E.*, 217 S.W.3d 557, 559 (Tex. App.—San Antonio 2006, no pet.). The movant must show both the conditions that existed at the time of the previous order and "what material changes have occurred in the intervening period." *Id.* at 559–60 (internal quotation marks omitted). "Material changes may include (1) the marriage of one of the parties, (2) poisoning of a child's mind by one of the parties, (3) change in the home surroundings, [or] (4) mistreatment of a child by a parent or step-parent[.]" *Arredondo v.*

Betancourt, 383 S.W.3d 730, 734–35 (Tex. App.—Houston [14th Dist.] 2012, no pet.). The movant is not required to show that the material and substantial change negatively affected the child. *See In re J.J.L.*, No. 04-12-00038-CV, 2012 WL 3985798, at *1 (Tex. App.—San Antonio Sept. 12, 2012, no pet.) (mem. op.).

Under the facts of this case, we cannot say the trial court abused its discretion by finding that the circumstances of Viridiana and the children had materially and substantially changed since the original SAPCR order. *See* TEX. FAM. CODE § 156.101(a). Jordan, the investigator assigned to perform a social study, did not testify at trial, but her reports were admitted into evidence. In her second report, which was dated January 30, 2018, she noted that "the children have been exposed to a great deal of change over the past two years." It is undisputed that at the time of the original SAPCR order, J.R.L. and V.R.L. lived together in Laredo and both Josue and Viridiana resided in that city. It is also undisputed that after the rendition of the original SAPCR order, Viridiana remarried, moved with J.R.L. and V.R.L. to a new city, and gave birth to two children. *See Arredondo*, 383 S.W.3d at 734–35; *see also Bates v. Tesar*, 81 S.W.3d 411, 430 (Tex. App.—El Paso 2002, no pet.) (listing factors to consider in determining whether parent's relocation was material and substantial change). The evidence also shows J.R.L. did not thrive after the move and returned to Laredo to live with Josue while V.R.L. remained in Rio Grande City with Viridiana.

Viridiana testified that she told J.R.L. the move to Rio Grande City was necessary because "his father was not being cooperative with me." She also testified that she told both children she could not buy them things they wanted "'because your father doesn't pay child support,'"[3] and she conceded that she gave V.R.L. access to a phone that listed Josue's phone number under the name

[3] The original SAPCR order specified that neither party was required to pay child support to the other. While the trial court signed temporary orders that required Josue to pay child support during the pendency of the modification proceeding, the modified SAPCR order again specifies that neither party is required to pay child support.

"idiot." *See Arredondo*, 383 S.W.3d at 734 (identifying "poisoning of a child's mind by one of the parties" as material change). There is also some evidence that J.R.L. did not get along with Viridiana's new husband, Mario, and that Mario "trie[d] to get in the middle of" Josue's conversations with V.R.L, made disparaging remarks about Josue in front of the children, and once physically attacked Josue in front of the children. *See id.* at 734–35 (identifying "mistreatment of a child by a parent or step-parent" as material change). Finally, Josue testified that "[t]here's times where [V.R.L.] is not allowed to come" to Laredo for her scheduled visits. He also testified that he is "not allowed to call" V.R.L.'s phone and can only contact V.R.L. and Viridiana through intermediaries, including Mario and twelve-year-old J.R.L.

To establish a material and substantial change, Josue was not required to show that Viridiana's remarriage and relocation and the children's subsequent separation from each other negatively affected the children. *See In re J.J.L.*, 2012 WL 3985798, at *1. Nevertheless, it is undisputed that the amount of time J.R.L. and V.R.L. spend with each other was greatly reduced after the rendition of the original SAPCR order and that the children missed each other. There is also some evidence that Viridiana and Mario's contentious relationship with Josue affected Josue's ability to visit and talk on the phone with V.R.L. and required twelve-year-old J.R.L. to act as an intermediary between his parents. We hold that this evidence would allow reasonable and fair-minded people to conclude that the circumstances of the children, a conservator, or other party affected by the order materially and substantially changed since the rendition of the original SAPCR order. *See In re Guardianship of C.E.M.-K.*, 341 S.W.3d at 80–81. Moreover, the trial court's implied finding of material and substantial change is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *See Zeifman*, 212 S.W.3d at 589.

Best Interest of the Children[4]

In any issue involving conservatorship of a child, the court's primary consideration must always be the child's best interest. TEX. FAM. CODE ANN. § 153.002. In determining whether modification is in a child's best interest, a trial court may look to the non-exhaustive list of factors the Texas Supreme Court promulgated in *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976). *See Epps*, 537 S.W.3d at 243. Those factors 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 individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child; (6) the plans for the child by the individuals seeking custody; (7) the stability of the home or proposed placement; (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*, 544 S.W.2d at 371–72. The factfinder is not required to consider all of the *Holley* factors, and under some circumstances, evidence of a single factor may be sufficient to support a best interest finding. *In re K.K.R.*, No. 04-18-00250-CV, 2019 WL 451761, at *4 (Tex. App.—San Antonio Feb. 6, 2019, no pet.) (mem. op.).

Furthermore, the Family Code provides, "[i]t is preferable for all children in a family to be together during periods of possession." TEX. FAM. CODE ANN. § 153.251(c). "[K]eeping siblings

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[4] Viridiana's brief does not explicitly argue that modification was not in the children's best interest. *See Townsend v. Vasquez*, 569 S.W.3d 796, 808 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (noting both elements of section 156.101(a) are required to support a modification). However, she argues generally that legally and factually insufficient evidence supports the trial court's order, and specifically that: (1) V.R.L. "expressed that she wanted to stay with her mother and was fine visiting her brother and her father"; (2) V.R.L "has been able to adjust [to the relocation] and maintain an A honor [roll]"; and (3) the children's ad litem "mentioned that [V.R.L.] would thrive in either environment." We construe these assertions as an argument that modification was not in the children's best interest. *See* TEX. R. APP. P. 38.1(f) ("The statement of an issue or point will be treated as covering every subsidiary question that is fairly concluded."). For that reason, we will consider whether the evidence supports a finding that modification was in the children's best interest. *See id.*

together is a factor a trial court may consider when deciding the best interest of the child." *Thornton v. Cash*, No. 14-11-01092-CV, 2013 WL 1683650, at *13 (Tex. App.—Houston [14th Dist.] Apr. 18, 2013, no pet.) (mem. op.).

Here, J.R.L.'s move from Viridiana's home in Rio Grande City to Josue's home in Laredo separated the children and limited their time together to weekend visits. While this separation resulted from an agreement between Viridiana and Josue, it is contrary to the Legislature's stated public policy preference. *See* TEX. FAM. CODE § 153.251(c). Moreover, the trial court heard some evidence that the children's separation was contrary to both their own desires and their emotional needs. *See Holley*, 544 S.W.2d at 371–72. Josue testified that V.R.L. missed spending time together with him and J.R.L. and that she "wanted to be here [in Laredo] with" them. Additionally, Jordan reported that J.R.L. and V.R.L. "seem to be very close to one another and really enjoy their time when they are together" and that both children "are having a difficult time adjusting to their current circumstances." Jordan recommended that Josue and Viridiana "make every attempt to ensure that the children spend as much time with one another as possible so as to preserve and nurture their relationship with one another." We conclude this evidence is sufficient to allow a reasonable factfinder to conclude that the children's best interest would be served by reuniting them. *See In re Guardianship of C.E.M.-K.*, 341 S.W.3d at 80–81. And because the trial court heard evidence that J.R.L. did not thrive in Rio Grande City but V.R.L. would do well in either home, a reasonable factfinder could also conclude that Josue's home most appropriately suited both children's best interest. *See id.*

Viridiana agreed that J.R.L. and V.R.L. missed each other while they were living apart, but she believed it was in V.R.L.'s best interest to stay in Rio Grande City "[b]ecause she's a little girl and she needs to be with her mother." Based on his interviews with the children, Lopez told the trial court that he believed it was in the children's best interest for them to live together. He also

stated, however, that V.R.L. had told him she wanted to stay with her mother and that she is comfortable in both homes. Additionally, Jordan's report noted that V.R.L. "is expressing some confusion about where she prefers to live" but "seems to enjoy living both in Laredo and in Rio Grande and would likely adapt well to either situation." While this is some evidence that V.R.L.'s preferences and emotional needs could arguably support keeping her in Rio Grande City with her mother, we do not believe the trial court's implied findings on the children's best interest are so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *See Zeifman*, 212 S.W.3d at 589.

The trial court also heard evidence about the stability of Viridiana's and Josue's homes. *See Holley*, 544 S.W.2d at 371–72. Viridiana moved to a new home twice between the filing of Josue's first modification petition on July 14, 2017 and the December 14, 2018 final hearing in this proceeding, and she testified that she was preparing to move a third time. She also testified that she, Mario, their two infant children, and V.R.L. lived in a two-bedroom, two-bathroom apartment and that twelve-year-old J.R.L shared a room with his seven-year-old sister, V.R.L., during his visits. *See In re H.R.H.*, No. 04-08-00538-CV, 2009 WL 1017835, at *3 (Tex. App.—San Antonio Apr. 15, 2009, no pet.) (mem. op.) (noting children's lack of privacy in one parent's home). Although Josue also moved at least once during the modification proceeding, V.R.L. and J.R.L. each had their own rooms and privacy in his home. *See id.* While it was essentially undisputed that V.R.L. was more adaptable than J.R.L. and could be happy living in either home, Josue also testified that "there's been times where [V.R.L.]'s been upset the way things are" at Viridiana's home. Additionally, while Lopez was careful to note that he did not fault Viridiana, he stated that the natural stressors associated with a new marriage and two infants in the home means "there's more responsibility on [V.R.L.] in her mom's house than there is in her dad's house" and that "at this age, she just deserves the right to be a kid."

Finally, there is some evidence upon which the trial court could have concluded that Viridiana committed acts or omissions that were not in the children's best interest. *See Holley*, 544 S.W.2d at 371–72; *In re C.A.M.M.*, 243 S.W.3d 211, 221 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Josue testified Viridiana did not tell him about her planned move to Rio Grande City and that he found out from the children. *See Bates*, 81 S.W.3d at 431 (noting "[Mother] failed to give [Father] proper notice of the change of residence"). He also testified, "There's times where [V.R.L.] is not allowed to come" to Laredo for her scheduled visits. Additionally, the trial court heard evidence that Viridiana allows Mario to interfere with V.R.L.'s phone calls with Josue, that Josue is "not allowed to call" V.R.L.'s phone, and that Josue can only contact V.R.L. and Viridiana through intermediaries, including Mario and twelve-year-old J.R.L. *See In re B.W.C.*, No. 04-18-00473-CV, 2019 WL 360659, at *4 (Tex. App.—San Antonio Jan. 30, 2019, no pet.) (mem. op.) (noting best interest finding was supported by evidence of parents' communication problems). Moreover, Viridiana herself testified that she: (1) told J.R.L. the move to Rio Grande City was necessary because "his father was not being cooperative with me"; (2) gave V.R.L access to a phone that designated her father as "idiot"; (3) told both children she cannot buy them things they want "'because your dad doesn't pay child support'"; and (4) wrote social media posts disparaging Josue. In at least one of those posts, Viridiana tagged a board member of the school district where Josue works and wrote that "the district shouldn't be employing people like [Josue], we need to check into him, why is he working for the school[.]" *See In re R.H.H.*, No. 04-09-00325-CV, 2010 WL 2842905, at *4 (Tex. App.—San Antonio July 21, 2010, no pet.) (mem. op.) (examining evidence of parent's "derogatory remarks" about other parent during best interest analysis).

We conclude that this evidence would allow a reasonable and fair-minded person to reach the trial court's implied finding that Josue's requested modification was in the children's best interest. *See In re Guardianship of C.E.M.-K.*, 341 S.W.3d at 80–81. Additionally, while there was

some evidence that V.R.L. wanted to remain with Viridiana and was thriving in her mother's home, the trial court's implied findings about her best interest are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *See Zeifman*, 212 S.W.3d at 589. Based on this evidence, the trial court did not act arbitrarily, unreasonably, or without reference to guiding principles by determining it was in the children's best interest to modify the original SAPCR order to give Josue the exclusive right to determine their primary residence. *See In re Guardianship of C.E.M.-K.*, 341 S.W.3d at 80. Accordingly, we overrule Viridiana's challenges to the trial court's order.

CONCLUSION

We affirm the trial court's order.

Beth Watkins, Justice