



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00393-CV

In re **C.R.**, Relator

Original Mandamus Proceeding¹

Opinion by: Irene Rios, Justice

Sitting: Irene Rios, Justice
Beth Watkins, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: December 29, 2021

PETITION FOR WRIT OF MANDAMUS CONDITIONALLY GRANTED

This original mandamus proceeding arises from a suit to modify the parent-child relationship. The relator, C.R., argues the trial court abused its discretion when it rendered a temporary order that has the effect of changing or eliminating the geographic restriction in the final order. *See* TEX. FAM. CODE ANN. § 156.006(b) (limiting the trial court’s authority to render a temporary order changing or eliminating a geographic restriction while a modification suit is pending). We conditionally grant mandamus relief.

BACKGROUND

C.R. and the real party-in-interest, K.F., are divorced with two children, a three-year-old and a five-year-old.² Their divorce decree (“the final order”) appoints C.R. and K.F. joint

¹This proceeding arises out of Cause No. 2019CI12197, pending in the 150th Judicial District Court, Bexar County, Texas, the Honorable Angelica Jimenez presiding.

²To protect the identity of the minor children, we refer to the parents by their initials in this opinion.

managing conservators of the children and gives each parent substantial possession and access to the children.³ However, the final order does not give either parent the exclusive right to designate the children's primary residence; instead, the final order restricts the children's primary residence to Bexar County. Specifically, the final order states: "It is ORDERED that the primary residence of the children shall be within Bexar County, and the parties shall not remove the children from Bexar County for the purpose of changing the primary residence of the children until this geographic restriction is modified by further order of the court of continuing jurisdiction or by a written agreement that is signed by the parties and filed with that court."

In 2021, a dispute arose about where the five-year-old child would attend school in the fall. At the time, K.F. was residing in Comal County, and C.R. was residing in Bexar County. C.R. advised K.F. that he wanted the child to attend a private school in Bexar County; K.F. countered that she wanted the child to attend a public school in Comal County.

On July 20, 2021, C.R. filed a suit⁴ to modify the parent-child relationship, asking the trial court to appoint him the parent with the exclusive right to designate the children's primary residence.

On August 17, 2021, K.F. filed a counterpetition to modify the parent-child relationship, asking the trial court to appoint her the parent with the exclusive right to designate the children's primary residence and to enroll the children in school. K.F. also asked the trial court to modify the geographic restriction in the final order from Bexar County to Bexar County and contiguous counties. In addition, K.F. filed a motion for temporary orders requesting she be designated "as

³The final order provides that K.F. has possession of the children from Monday at 8:00 a.m. to Wednesday at 8:00 a.m. and every first, third, and fifth weekend; and C.R. has possession of the children from Wednesday at 8:00 a.m. to Friday at 8:00 a.m. and every second and fourth weekend.

⁴C.R.'s modification petition also included a motion to enforce provisions in the final order requiring the parties to subscribe to the Family Wizard computer program. C.R.'s motion to enforce was denied by the trial court.

the conservator who has the exclusive right to designate the primary residence of the children and enroll the child in school” and requesting modification of “the geographic restriction restricting the children’s primary residence [from] Bexar County to Bexar and contiguous counties.”

On August 20, 2021, the trial court held a hearing on K.F.’s motion for temporary orders. At the beginning of the hearing, C.R.’s counsel objected to K.F.’s motion for temporary orders asserting the relief sought would impermissibly modify the geographic restriction in the final order in violation of section 156.006(b) of the Texas Family Code. In response, K.F.’s counsel acknowledged that K.F.’s motion for temporary orders requested a modification of the geographic restriction, but she seemed to indicate to the trial court that she was abandoning this request. K.F.’s counsel told the trial court: “[W]hat we want to move forward with today is the portion . . . of our pleading where we are asking for [K.F.] to have the exclusive right to enroll the child in school.” K.F.’s counsel further stated: “[W]hat we are asking the court [to do] today is to award [K.F.] the exclusive [right] to enroll . . . the oldest child, the five year old [], in Comal.”⁵

The trial court overruled C.R.’s objection and stated: “The . . . objection to moving forward on the modification is overruled. I will not be moving forward on a geographic restriction as [K.F.’s counsel] has not asked me to. It will be as to the authority to enroll in school only.” C.R. then reiterated his earlier objection, stating: “Your Honor, we would like to renew our objection because the school that they are asking for is in Comal County which . . . would be a modification of the geographic restriction.”

The trial court then directed the parties to proceed with the presentation of evidence. Thereafter, both C.R. and K.F. testified.

⁵The extent to which K.F.’s counsel actually abandoned parts of her motion for temporary orders is unclear. K.F.’s counsel also told the trial court: “So we ask the court to allow us to move forward as to the designation of who should have the exclusive right of primary residence.”

In his testimony, C.R. stated that he had advised K.F. in March or April 2021 that he wanted to enroll the child in a private school in Bexar County, but K.F. would not agree to this school. Instead, K.F. said she planned to enroll the child in the public school near her residence in Comal County. C.R. eventually received an email confirming that the child was enrolled in a public school in Comal County.⁶

In her testimony, K.F. stated that she had enrolled the child in a public school near her residence in Comal County. To register the child, K.F. represented to the school that the child's residence was in Comal County. K.F. pointed out that the final order did not give her and C.R. equal possession and access to the children; it afforded her greater possession and access to the children than C.R. K.F. emphasized that the child resided with her more than fifty percent of the time, and "[f]or more than 50 percent of the time [the child] sleep[s] in Comal County." K.F. said she was aware of the provision in the final order restricting the child's primary residence to Bexar County.

After hearing all the evidence, the trial court signed a temporary order stating that K.F. "shall have the exclusive right to enroll the child in school. Each conservator, during that conservator's period of possession, is ORDERED to ensure the child's attendance in the schools in which [K.F.] has enrolled the child[]."

C.R. filed a mandamus petition in this court, arguing the trial court's temporary order has the effect of changing or eliminating the geographic restriction in the final order in violation of section 156.006(b) of the Texas Family Code, which provides:

While a suit for modification is pending, *the court may not render a temporary order that has the effect of creating a designation, or changing the designation, of*

⁶C.R. further testified that on August 17, 2021, the trial court signed an interim order authorizing the child to attend the private school in Bexar County and, in accordance with this interim order, the child attended a full day of classes at the private school in Bexar County. The interim order was not made part of the mandamus record; however, in her response K.F. acknowledges the existence of the interim order.

the person who has the exclusive right to designate the primary residence of the child, or *the effect of creating a geographic area, or changing or eliminating the geographic area*, within which a conservator must maintain the child's primary residence, under the final order unless the temporary order is in the best interest of the child and:

- (1) the order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development;
- (2) the person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than six months; or
- (3) the child is 12 years of age or older and has expressed to the court in chambers as provided by Section 153.009 the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child.

TEX. FAM. CODE ANN. §156.006(b) (emphasis added).

Because C.R.'s petition presented a serious question concerning the relief sought, we requested a response. *See* TEX. R. APP. P. 52.8(b)(1) (requiring the appellate court to request a response when a mandamus petition presents a serious question concerning the relief requested). K.F. filed a response, in which she argues the trial court did not abuse its discretion because the temporary order does not have the effect of modifying the geographic restriction in the final order under the facts and circumstances presented.

STANDARD OF REVIEW

Appellate courts grant mandamus relief only when the trial court abuses its discretion and the aggrieved party has no adequate remedy by appeal. *In re Sw. Bell Tel. Co.*, 226 S.W.3d 400, 403 (Tex. 2007) (orig. proceeding). Because temporary orders in a child custody modification suit are interlocutory and not appealable, mandamus is an appropriate way to challenge them. *In re Derzapf*, 219 S.W.3d 327, 335 (Tex. 2007) (orig. proceeding); *Little v. Daggett*, 858 S.W.2d 368, 369 (Tex. 1993) (orig. proceeding); *Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991) (orig. proceeding).

A trial court abuses its discretion when it acts “without reference to guiding rules and principles.” *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018) (orig. proceeding). “A trial court has no ‘discretion’ in determining what the law is or applying the law to the facts,” and “a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion.” *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding); see *In re Sw. Bell Tel. Co.*, 226 S.W.3d at 403 (“A trial court abuses its discretion if it fails to analyze or apply the law correctly.”).

TEMPORARY ORDERS IN MODIFICATION SUITS

While a modification suit is pending, a trial court is prohibited from rendering a temporary order that “has the effect of” “changing or eliminating the geographic area, within which a conservator must maintain the child’s primary residence,” unless the evidence establishes one of the exceptions listed in the statute and the temporary order is in the child’s best interest. See TEX. FAM. CODE ANN. § 156.006(b).

In the past, this court has conditionally granted mandamus relief to correct temporary orders issued in violation of section 156.006(b). See, e.g., *In re Walser*, No. 04-21-00291-CV, 2021 WL 4296048, at *4 (Tex. App.—San Antonio Sept. 22, 2021, orig. proceeding); *In re Lee*, No. 04-19-00440-CV, 2019 WL 3642640, at *4 (Tex. App.—San Antonio Aug. 7, 2019, orig. proceeding) (mem. op.); *In re Sanchez*, 228 S.W.3d 214, 219 (Tex. App.—San Antonio 2007, orig. proceeding); *In re Levay*, 179 S.W.3d 93, 97 (Tex. App.—San Antonio 2005, orig. proceeding).

In *In re Levay*, the final order appointed the father the conservator with the exclusive right to determine the child’s primary residence. 179 S.W.3d at 94. During the pendency of the modification suit, the trial court rendered a temporary order that ordered the child’s admission into a residential treatment facility and gave the facility the sole discretion to determine where the child would live and who she would be able see for an indefinite period of time. *Id.* at 96-97.

Additionally, no evidence was presented to establish an exception under section 156.006(b). *Id.* at 97. We concluded the trial court's temporary order had the effect of changing the designation of the person with the right to determine the child's primary residence under the final order and conditionally granted mandamus relief. *Id.*

The version of section 156.006(b) in effect when we decided *In re Levay* only prohibited temporary orders having the effect of changing the designation of the person who had the exclusive right to designate the child's primary residence. *See id.* at 95. In 2017, however, the legislature amended section 156.006(b) to also prohibit temporary orders that have the effect of creating a geographic area or changing or eliminating the geographic area within which a conservator must maintain the child's primary residence. *See* Act of May 11, 2017, 85th Leg., R.S., ch. 91 § 1, effective September 1, 2017. As noted in the bill analysis, section 156.006(b) was amended because "[m]any orders designate the geographic area of the child's residence rather than designating a parent who makes that decision." Texas Bill Analysis, Tex. H.B. 1495, 85th Leg., R.S. (2017). The amendment "makes it clear that the geographic area within which the child resides cannot be changed while a suit for modification is pending in order to maintain the stability of the child until a decision is reached." *Id.*

Consistent with the 2017 amendments to section 156.006(b), in *In re Lee*, we conditionally granted mandamus relief when the trial court rendered a temporary order that lifted a geographical restriction imposed on a parent in the final order and the parent failed to establish one of the exceptions in the statute. 2019 WL 3642640, at *4. Similarly, in *In re Walser*, we conditionally granted mandamus relief when the trial court rendered a temporary order that had the effect of creating a geographic area within which the conservator had to maintain the children's primary residence and the evidence was legally insufficient to support a finding of one of the exceptions in the statute. 2021 WL 4296048, at *3-4.

DISCUSSION

Here, it is undisputed that K.F. did not plead or prove any of the exceptions listed in section 156.006(b). Therefore, the dispositive issue is whether the temporary order giving K.F. the exclusive right to enroll the child in school has the effect of changing or eliminating the final order's geographic restriction requiring the child's primary residence to be in Bexar County.

K.F. argues the temporary order does not have the effect of changing or eliminating the geographic restriction in the final order for various reasons. K.F. asserts that she abandoned her request for a temporary order changing the geographic restriction at the beginning of the hearing; that the trial court expressly stated that it was not changing the geographic restriction; and that the evidence indicated that the parties did not heed the Bexar County geographic restriction in the past. These arguments lack merit.

In deciding if a temporary order effectively changes or eliminates the final order's geographic restriction, appellate courts do not focus on the trial court's characterization of its temporary order, but on the temporary order's substance. *See In re Sanchez*, 228 S.W.3d at 217. To determine if a temporary order effectively creates, changes, or eliminates a geographic restriction, appellate courts examine the temporary order in relation to the final order and the evidence presented. *See id.*; *see also In re Serio*, No. 03-14-00786-CV, 2014 WL 7458735, at *1 (Tex. App.—Austin Dec. 23, 2014, orig. proceeding) (mem. op.) (conditionally granting mandamus relief when the temporary order “expressly affect[ed] only the school the children [were to] attend,” but effectively deprived the parent of any discretion inherent in her right to determine the children's primary residence under the final order).

In *In re J.W.*, the final order designated the father as the parent with the exclusive right to determine the children's residence; however, the trial court rendered a temporary order requiring the children to attend a school selected by the children's mother and outside the school district

where the father resided. No. 02-18-00419-CV, 2019 WL 2223216, at *1 (Tex. App.—Fort Worth May 23, 2019, orig. proceeding) (mem. op.). The Fort Worth court of appeals noted that the temporary order did not expressly change the final order’s designation of the person with the exclusive right to determine the children’s primary residence; it only affected the school the children would attend. *Id.* at *3. Nevertheless, the court of appeals explained that the temporary order “ha[d] the effect of creating a geographic area in which [the father] must maintain the children’s residence because [it] create[d] a geographic limitation” when the final order had none. *Id.* The court of appeals determined that the trial court’s temporary order had the effect of changing the designation in the final order. *Id.* at *4. Because the evidence did not establish the existence of one of the exceptions listed in the statute, the court of appeals concluded the temporary order violated section 156.006(b) and conditionally granted mandamus relief and directed the trial court to vacate its temporary order designating school attendance. *Id.* at *4-5.

Turning to the present case, K.F. argues that the temporary order’s right to enroll the child in school and the final order’s geographic restriction are distinct considerations. We disagree. As the above-cited cases illustrate, the right to designate a child’s primary residence, the right to designate school enrollment, and a geographic restriction are closely connected and may even overlap, depending on the provisions in the final order and the evidence presented. *See id.* at*3-4; *In re Serio*, 2014 WL 7458735, at *1.

Under Texas law, the child’s primary residence is closely connected to the right to designate school enrollment. *See In re W.B.B.*, No. 05-17-00384-CV, 2018 WL 3434588, at *3 (Tex. App.—Dallas July 17, 2018, no pet.) (mem. op.); *Doncer v. Dickerson*, 81 S.W.3d 349, 361 (Tex. App.—El Paso 2002, no pet.). One of the two reasons to designate a child’s primary residence, either by use of a geographic restriction or by giving one parent the exclusive right to designate primary residence, is to determine the child’s residency for purposes of public school

enrollment. *In re W.B.B.*, 2018 WL 3434588, at *3; *see In re S.H.*, No. 02-15-00360-CV, 2017 WL 2871682, at *6 (Tex. App.—Fort Worth July 6, 2017, no pet.) (mem. op.) (recognizing that “the designation of a child’s primary residence often determines which public schools the child may attend.”); *Doncer*, 81 S.W.3d at 361 (“[O]ne parent must have the ability to determine residency for purposes of public school enrollment if the parents reside in different districts.”).

K.F. further argues that the temporary order does not have the effect of changing or eliminating the geographic restriction in the final order because the child’s primary residence is not in Comal County. This argument is not supported by the evidence. In her testimony, K.F. claimed (1) that she herself resides in Comal County, (2) that the child resides with K.F. more than fifty percent of the time, and (3) that the child sleeps in Comal County more than fifty percent of the time. Thus, as a practical matter, the evidence establishes that the child primarily resides in Comal County.

Additionally, K.F. testified that when she enrolled the child in school in Comal County, she represented to the school that the child resided in Comal County. K.F.’s testimony on this point was not disputed. Therefore, the evidence establishes that the child’s enrollment in a public school in Comal County was based on the child residing in Comal County.

We hold that the trial court’s temporary order giving K.F. the exclusive right to enroll the child in school in Comal County has the effect of changing or eliminating the Bexar County geographic restriction in the final order. Under section 156.006(b), the trial court was prohibited from rendering such a temporary order unless K.F. produced evidence establishing one of the exceptions in the statute. K.F. does not argue that she produced any such evidence, and the record

confirms that she did not.⁷ We conclude the trial court abused its discretion when it rendered a temporary order appointing K.F. as the parent with the exclusive right to enroll the child in school.⁸

CONCLUSION

We conditionally grant the petition for a writ of mandamus. The trial court is directed to vacate the part of its September 14, 2021 temporary orders stating that K.F. “shall have the exclusive right to enroll the child in school” and that “[e]ach conservator, during that conservator’s period of possession, is ORDERED to ensure the child’s attendance in the schools in which [K.F.] has enrolled the child[.]” The writ will issue only if the trial court fails to comply within ten days of the date of this opinion.

Irene Rios, Justice

⁷We recognize that to satisfy section 156.006(b)’s requirements, a movant is not only required to establish one of the exceptions listed in the statute, she is also required to establish that the temporary order is in the child’s best interest. *See* TEX. FAM. CODE ANN. § 156.006(b).

⁸C.R. also argues the trial court abused its discretion by scheduling a hearing on K.F.’s motion for temporary orders in the absence of the affidavit required under section 156.006(b-1) of the Texas Family Code. We need not address this argument because it is unnecessary to the disposition of this proceeding. *See* TEX. FAM. CODE ANN. § 156.006(b-1).