Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00253-CV

IN THE INTEREST OF J.B.R., a Child

From the County Court at Law, Kerr County, Texas
Trial Court No. 161068C
Honorable Susan Harris, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: September 28, 2022

AFFIRMED

Appellant Father filed a petition to modify a 2017 order establishing the parent-child relationship for the child J.B.R. requesting the trial court increase his visitation and restrict the child's residence to Kerr County and contiguous counties. Relevant to this appeal, the trial court modified the 2017 order to increase Father's visitation, but restricted the child's residence to Kerr, Bexar, and Atascosa counties as well as counties contiguous to Kerr County. We affirm the trial court's modification order.

BACKGROUND

The 2017 order establishing the parent-child relationship appointed appellant Father and appellee Mother as J.B.R.'s joint managing conservators. The order gave Mother the right to

determine J.B.R.'s primary residence without regard to geographic location. At that time, both Father and Mother lived in Kerr County.

Two and a half years later, Father sought to modify the 2017 order to restrict the child's primary residence to Kerr County and to deny Mother's access to J.B.R. Father sought extended visitation, complaining that two hours on Thursday was insufficient; instead, Father sought visitation from Thursday until Sunday. After a hearing on Father's petition to modify the parent-child relationship—and several hearings to resolve disagreements between Father and Mother—the trial court modified the 2017 order to restrict the child's primary residence to Kerr, Bexar, and Atascosa counties as well as counties contiguous to Kerr County and granted Father extended visitation.

Before the parties could agree on the language in the final written modification order, Mother obtained a job in San Antonio, Bexar County, and moved there. Disagreement about the location for exchanging J.B.R. for visitation ensued and delayed the entry of a final modification order for eight months. Mother was willing to meet somewhere midway between Father's residence and Mother's residence to exchange J.B.R., but Father insisted that Mother deliver J.B.R to the Kerrville Police Department, about ninety miles away.

The trial court's modification order included Texas's standard possession provisions for parties who live 100 miles or less apart and the standard possession provisions for parties who live more than 100 miles apart. Under the modification order, Mother would surrender J.B.R. to Father at J.B.R.'s school when school is in session and at the Kerrville Police Department when school is not in session. Dissatisfied with the modification order, Father appealed.

DISCUSSION

On appeal, Father claims: (1) the trial court should have restricted the child's primary residence to Kerr County and contiguous counties; and (2) the trial court's written order deviated

from the oral ruling pronounced at the conclusion of the hearing on Father's petition to modify the parent-child relationship.

STANDARD OF REVIEW

We review a trial court's order modifying child custody, control, possession, and visitation for an abuse of discretion. *In re M.V.*, 583 S.W.3d 354, 360–61 (Tex. App.—El Paso 2019, no pet.); *In re H.N.T.*, 367 S.W.3d 901, 903 (Tex. App.—Dallas 2012, no pet.); *In re Guardianship of C.E.M.-K.*, 341 S.W.3d 68, 80 (Tex. App.—San Antonio 2011, pet. denied). A trial court abuses its discretion when it acts arbitrarily or unreasonably without reference to guiding principles. *M.V.*, 583 S.W.3d at 360. In determining whether the trial court abused its discretion, we are mindful that the trial court has great latitude in determining the best interest of the child. *Id.* at 361; *In re Marriage of Christensen*, 570 S.W.3d 933, 937–38 (Tex. App.—Texarkana 2019, no pet.).

"To determine whether the trial court abused its discretion, we engage in a two-pronged inquiry, asking: (1) whether the trial court had sufficient information upon which to exercise its discretion; and (2) whether the trial court erred in its application of discretion." *M.V.*, 583 S.W.3d at 361. "In this context, challenges to the legal and factual sufficiency of the evidence are not independent grounds of error but are instead relevant factors in assessing whether the trial court abused its discretion." *Id.*

GEOGRAPHIC RESTRICTION

Father contends the trial court should have restricted the child's primary residence to Kerr County and contiguous counties. According to Father, a geographic restriction that extends beyond counties contiguous to Kerr County interferes with his ability to maintain a parent-child relationship with J.B.R. and prohibits J.B.R. from maintaining relationships with Father's other children and relatives.

The Texas Family Code tasks the trial court with designating "the conservator who has the exclusive right to determine the primary residence of the child," and to either specify that "the conservator may determine the child's primary residence without regard to geographic location" *or* establish "a geographic area within which the conservator shall maintain the child's primary residence[.]" TEX. FAM. CODE ANN. § 153.134(b). In doing so, the trial court must consider the best interest of the child. *Gardner v. Gardner*, 229 S.W.3d 747, 753 (Tex. App.—San Antonio 2007, no pet.). Although the 2017 order did not contain a geographic restriction, the family code authorizes the trial court to modify an order providing the terms and conditions of a child's conservatorship "if modification would be in the best interest of the child[.]"[1] TEX. FAM. CODE ANN. § 156.101. Thus, the best interest of the child is the guiding principle of law.

"[T]he Texas Supreme Court [has] provided a variety of factors relevant to the determination of whether a geographic restriction is in the best interest of the child, including: (1) the reasons for and against the move, including the parents' good faith motives in requesting or opposing it; (2) health, education, and leisure opportunities; (3) the degree of economic, emotional, and educational enhancement for the custodial parent and child; (4) the effect on extended family relationships; (5) accommodation of the child's special needs or talents; (6) the effect on visitation and communication with the non-custodial parent to maintain a full and continuous relationship with the child; (7) the possibility of a visitation schedule allowing the continuation of a meaningful relationship between the non-custodial parent and child; and (8) the ability of the non-custodial parent to relocate." *In re C.M.*, No. 04-12-00395-CV, 2014 WL

[1] Section 156.101 of the Texas Family Code also requires either (1) a material and substantial change in the circumstances of the child, a conservator, or other party affected by the order; (2) the child is at least 12 years of age and has expressed to the court in chambers the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child; or (3) the conservator who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months. TEX. FAM. CODE ANN. § 156.101(a)(1).

2002843, at *3 (Tex. App.—San Antonio May 14, 2014, no pet.) (citing *Lenz v. Lenz*, 79 S.W.3d 10, 14–16 (Tex. 2002)).

Father's argument flows, in significant part, from his belief that Mother lied about wanting to leave Kerr County to obtain better employment and his belief that better employment opportunities exist in Kerr County and contiguous counties. 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 undiscernible from merely reading the record. *In re J.S.P.*, 278 S.W.3d 414, 418–19 (Tex. App.—San Antonio 2008, no pet.). The trial court does not abuse its discretion so long as some evidence of a probative and substantive character supports its decision. *Marriage of Christensen*, 570 S.W.3d at 937–38. "[A]n abuse of discretion does not occur when the trial court bases its decisions on conflicting evidence." *In re A.D.H.*, 979 S.W.2d 445, 447 (Tex. App.—Beaumont 1998, no pet.).

Here, the trial court considered conflicting evidence. Mother testified she worked part time at a senior living facility at night to facilitate her children's remote learning during the pandemic. Mother explained she sought to move to San Antonio to obtain a better job and to increase her income. She also testified about: (1) her hope of returning to school; (2) the stress of living and shopping in the same town as Father and Father's family; (3) Child Protective Services visits that seemed to be initiated by Father's relatives; (4) her willingness for Father to have J.B.R. from Thursday to Monday if Father could facilitate remote learning; (5) her willingness to allow Father to take J.B.R. to Mexico for vacation if she could take J.B.R. to the Dominican Republic to visit her family; (6) Father's unwillingness to visit another son who lives in San Antonio; (7) how Father's girlfriend records her during exchanges for visitation; and (8) Father's child-support arrearages.

Mother's testimony indicates that moving to Bexar County would facilitate a more cohesive parenting relationship. The trial court could have also inferred the move would be in the best interest of the child because Mother's improved lifestyle and earning capacity resulting from the move would have downstream benefits to the child. Finally, although the modification would result in the child's primary residence being further away from Father, Mother testified she would agree to a modified or extended visitation schedule so Father's access to the child would not be diminished.

Although Father also testified,[2] Mother's testimony constitutes evidence of a probative and substantive character that supports the trial court's decision to include Bexar and Atascosa counties in the geographic restriction because this geographic restriction would be in J.B.R.'s best interest. We conclude the trial court's decision to extend the geographic restrictions to Bexar County and Atascosa County was not an abuse of its discretion.

Accordingly, Father's first issue is overruled.

THE ORAL PRONOUNCEMENT CONFLICT WITH THE WRITTEN ORDER

At the conclusion of the hearing on Father's petition to modify the parent-child relationship, the trial court orally pronounced a ruling. Relevant here, the trial court ordered (1) "the extended standard possession order,"[3] and (2) "exchanges to be at the police department." The trial court directed the attorneys to confer about a written order. On appeal, Father maintains

[2] Father explained he wanted J.B.R. to remain in Kerr County because J.B.R. had lived there all his life. Father testified about: (1) J.B.R's loving relationship with his brothers and other relatives who live in Kerr County; (2) how much fun J.B.R. had during visits fishing, swimming, and attending family barbecues and birthday parties in Kerr County; (3) the difficulty of maintaining a relationship with another son who lived in San Antonio; (4) his employment difficulties and new job prospect; (5) his desire for more visitation time on Thursdays because he did not think two hours was enough; (6) his willingness to give up visitation on Thursday for more time on Sunday because an older son participates in football on Thursdays; (7) his complaint that J.B.R. can't play outside because he lives in an apartment in San Antonio; (8) why he was behind on child support; and (9) a request for a lower child support payment.

[3] It appears the trial court is referring to a standard possession order with alternative beginning and ending possession times under section 153.317 of the Texas Family Code. *See* TEX. FAM. CODE ANN. § 153.317.

the signed written order deviated from the oral pronouncement by including provisions for parties who reside more than 100 miles apart and a provision requiring Father to pick up and return J.B.R. at his school when school is in session.

"In civil cases, when a trial court's oral pronouncement conflicts with a written judgment, the written judgment prevails." *In re I.L.*, 580 S.W.3d 227, 244 (Tex. App.—San Antonio 2019, pet. dism'd) (alternations omitted). "And, during the trial court's period of plenary power, the court always has the authority to change or modify the final order or judgment in the case." *Id.* Here, the trial court's written modification order prevails over its oral pronouncement.

Moreover, Father's argument fails for additional reasons. As for Father's first complaint—the inclusion of provisions for parents who live more than 100 miles apart—the Texas Family Code's standard possession provisions and the best interest of the child serve as the trial court's guiding principles. *See* TEX. FAM. CODE ANN. §§ 153.002, 153.251. Notably, Father identified no deviation, except to complain that the written order should not include provisions for parents who live more than 100 miles apart. The expansion of the geographic restriction to Bexar and Atascosa counties as well as counties contiguous to Kerr County, however, necessitated those provisions. Father's argument—that the written order deviated from the oral pronouncement—amounts to a complaint that the trial court did not orally pronounce the inclusion of standard provisions for "Parents Who Reside 100 Miles or Less Apart" and "Parents Who Reside Over 100 Miles Apart." *See* TEX. FAM. CODE ANN. §§ 153.312, 153.313. However, these provisions in the trial court's modification order mirror provisions of a standard possession order under the Texas Family Code and the inclusion of these provisions in the modification order was not an abuse of discretion. *See id.* § 153.312 (stating standard possession for joint managing conservators when the parents reside 100 miles or less from one another); *id.* § 153.313 (stating standard possession for joint managing conservators when the parents reside more than 100 miles from one another); *see also id.*

§ 153.251(a) ("The guidelines established in the standard possession order are intended to guide the courts in ordering the terms and conditions for possession of a child by a parent named as a possessory conservator or as the minimum possession for a joint managing conservator."); *id.* § 153.252 ("[T]here is a rebuttable presumption that the standard possession order . . . : (1) provides reasonable minimum possession of a child for a parent named as a possessory conservator or joint managing conservator; and (2) is in the best interest of the child."); *id.* § 153.253 ("The court shall render an order that grants periods of possession of the child as similar as possible to those provided by the standard possession order if the work schedule or other special circumstances of the managing conservator, the possessory conservator, or the child, or the year-round school schedule of the child, make the standard order unworkable or inappropriate.").

We decline to hold that—when a trial court grants possession, visitation, and access under a standard possession order—the trial court's failure to orally pronounce every provision of the standard possession order is a deviation from the written order granting standard possession under the family code. Accordingly, the trial court's failure to orally pronounce the inclusion of standard provisions for "Parents Who Reside 100 Miles or Less Apart" and "Parents Who Reside Over 100 Miles Apart" does not constitute a deviation between the oral pronouncement and the written modification order.

Father's second complaint—regarding the exchange location—flows from the following provision for parents who live within 100 miles:

> The parties shall exchange the child *at the Kerrville Police Department* in Kerrville, Texas. If [Mother] moves outside of Kerr County, as provided by this order, the parties shall exchange the child at the police department. When the child is in school, [Mother] shall surrender the child to [Father] at the beginning of each period of possession *at the school in which the child is enrolled*; [Father] shall surrender the child to [Mother] at the end of each period of possession *at the school at which the child is enrolled*.

The effect of this provision is that Mother must take J.B.R. to the Kerrville Police Department for exchanges when school is not in session. When school is in session, the provision requires Father to pick J.B.R. up from school upon school dismissal, or otherwise arrange for J.B.R.'s pickup, and return J.B.R. to school when school resumes on Monday.

Father requested extended visitation and the trial court granted the Father's request in accordance with section 153.317 of the Texas Family Code. Section 153.317 provides for alternative beginning and ending possession times under the standard possession order. It permits the trial court to extend Father's "weekend periods of possession . . . [to begin] at the time the child's school is regularly dismissed [and end] at the time the child's school resumes after the weekend." TEX. FAM. CODE ANN. § 153.317(a)(1). It further provides for "Thursday periods of possession . . . [to begin] at the time the child's school is regularly dismissed [and end] at the time the child's school resumes on Friday." *Id.* § 153.317(a)(2). Section 153.316 states "if the possessory conservator elects to begin a period of possession at the time the child's school is regularly dismissed, the managing conservator shall surrender the child to the possessory conservator . . . at the school in which the child is enrolled" and "if the possessory conservator elects to end a period of possession at the time the child's school resumes, the possessory conservator shall surrender the child . . . at the school in which the child is enrolled." TEX. FAM. CODE ANN. § 153.316(2), (4).

Father contends the trial court erred because the oral pronouncement provided for exchanges at the Kerrville Police Department, but the trial court's oral pronouncement did not specify the Kerrville Police Department—the announcement identified "the police department."

Further, Father's argument ignores subsequent proceedings. Because the trial court extended the geographic restriction to include Bexar and Atascosa counties, and because the exchange location was only identified as "the police department," Mom sought clarification about

the exchange location. The trial court resolved the matter during several hearings occurring after the oral pronouncement, but before the written modification order was entered.

During these hearings, Father insisted Mother surrender J.B.R. at the Kerrville Police Department. Father reasoned Mother should be the parent who drives back and forth between San Antonio and Kerrville because Mother chose to take J.B.R. from Kerr County. Mother was willing to meet somewhere between her residence and Father's residence, but Father refused the offer, even foregoing visitation when Mother did not take J.B.R. to the Kerrville Police Department. The trial court repeatedly encouraged the parties and the attorneys to work together to agree on a mutually agreeable exchange location. Ultimately, the parties could not agree, and the trial court identified an exchange location to serve J.B.R.'s best interest and in accordance with section 153.316 of the Texas Family Code. *Id.* Contrary to appellant's assertion, the modification order comported with the trial court's oral pronouncement after several hearings pertaining to the language of the written modification order. Because Father sought, and the trial court granted, extended visitation under section 153.317 of the Texas Family Code, the trial court acted within its broad discretion when it ordered exchanges occur at J.B.R.'s school in accordance with section 153.316 of the Texas Family Code.

Accordingly, Father's second issue is overruled.

Conclusion

We affirm the trial court's modification order dated May 17, 2021.

Irene Rios, Justice