



**In The  
Court of Appeals  
Seventh District of Texas at Amarillo**

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No. 07-16-00289-CV

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**ELIZABETH SANCHEZ GONZALEZ, APPELLANT**

**V.**

**ELIAS RAMIREZ SANCHEZ, JR., APPELLEE**

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On Appeal from the 46th District Court  
Wilbarger County, Texas  
Trial Court No. 26,598; Honorable Dan Mike Bird, Presiding

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February 23, 2018

**MEMORANDUM OPINION**

**Before QUINN, C.J., and PIRTLE and PARKER, JJ.**

Appellant, Elizabeth Sanchez Gonzalez, challenges the trial court's *Order in Suit to Modify Parent-Child Relationship*. By two issues, she contends the trial court abused its discretion by (1) finding a material and substantial change of circumstances had occurred and (2) granting Appellee, Elias Ramirez Sanchez, Jr., the exclusive right to establish their children's domicile. We affirm.

## BACKGROUND

The parties were divorced in April 2013. At that time, the trial court appointed both parents as joint managing conservators of their two children, N.C.S. and C.B.S.,<sup>1</sup> with Elizabeth having the exclusive right to designate the children's primary residence within 300 miles of Wilbarger County. Elias was ordered to pay child support. Sometime in 2015, Elizabeth and the children moved to San Angelo in Tom Green County, which is within the geographic restriction. In October 2015, the Texas Attorney General moved to enforce child support and medical support contemporaneously with a motion to transfer venue of the case to Tom Green County.

Elias objected to the motion to transfer based on evidence that showed the children had not resided in Tom Green County for the required six-month period. On November 15, 2015, he filed a counterpetition seeking to modify the parent-child relationship because Elizabeth's fiancé, a convicted felon,<sup>2</sup> had moved in with her and the children. Elias alleged that Elizabeth allowed people into her home that presented a danger to the children. He requested and was granted a temporary restraining order that restrained Elizabeth from, among other things, leaving the children in the care of her fiancé or other persons of questionable character. The obligation to pay child support remained with Elias.

The temporary orders were subsequently entered on January 7, 2016, leaving both parents as joint managing conservators—but this time restricting Elizabeth's right to

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<sup>1</sup> To protect the children's privacy, we refer to them by their initials. See TEX. FAM. CODE ANN. § 109.002(d) (West Supp. 2017).

<sup>2</sup> Elizabeth's fiancé was convicted of aggravated assault in 2011 and was granted shock probation.

establish the children's domicile to either Wilbarger County or Tom Green County. On February 25, 2016, the trial court again amended the temporary orders, this time to provide that Elias should have the exclusive right to establish the children's domicile in either of the two counties.<sup>3</sup> By that same amended temporary order, the trial court terminated Elias's child support obligation and ordered Elizabeth to start paying support for the children.

In response, in March 2016, Elizabeth filed her *Counterpetition to Modify Parent-Child Relationship* seeking to modify custody, eliminate geographic restrictions, and require each party to meet half-way when exchanging possession of the children. She also requested an increase in child support. Her pleading specifically alleged that "[t]he circumstances of the children, a conservator, or other party affected by the order to be modified have materially and substantially changed since the date of rendition of the order to be modified."

Following a hearing, the trial court ordered that the parents serve as joint managing conservators with Elias having the exclusive right to establish the children's domicile in Wilbarger County. Elizabeth was also ordered to pay child support. Additional provisions of the trial court's order included Elias taking his children for counseling, making sure the children were not around Yvonne Gonzalez, and following up on his treatment for epilepsy. Elizabeth was ordered to make sure that her father did not live in the home with

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<sup>3</sup> Section 156.006(b) of the Family Code provides that when a modification suit is pending, temporary orders changing the designation of the person who has the exclusive right to designate the primary residence should not be made unless it is in the child's best interest and at least one of the other exceptions provided in (b)(1), (2), or (3) applies. The trial court's amended temporary order does recite it is in the children's best interest but it does not specify which, if any, of the other exceptions is applicable. Temporary orders, however, are not appealable. See *Little v. Daggett*, 858 S.W.2d 368, 369 (Tex. 1993) (orig. proceeding); *In re Strickland*, 358 S.W.3d 818, 820 (Tex. App.—Fort Worth 2012, orig. proceeding).

the children. Pursuant to Elizabeth's request, the trial court entered *Findings of Fact and Conclusions of Law*.

#### APPLICABLE LAW

A trial court may modify a prior conservatorship order if modification would be in the best interest of the child and the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since rendition of the prior order. TEX. FAM. CODE ANN. § 156.101(a)(1)(A) (West 2014). There are no guidelines as to what constitutes a material and substantial change in circumstances. See *In re N.R.T.*, 338 S.W.3d 667, 679 (Tex. App.—Amarillo 2011, no pet.).

The burden to establish a material and substantial change in circumstances by a preponderance of the evidence falls on the party seeking modification. *Agraz v. Carnley*, 143 S.W.3d 547, 553 (Tex. App.—Dallas 2004, no pet.). A material and substantial change occurs when the party seeking modification demonstrates the conditions that existed at the time of entry of the prior order have changed as compared to the circumstances existing at the time of the modification hearing. *Zeifman v. Michels*, 212 S.W.3d 582, 589 (Tex. App.—Austin 2006, pet. denied).

A trial court's findings on modification of conservatorship shall be based on a preponderance of the evidence. TEX. FAM. CODE ANN. § 105.005 (West 2014). The best interest of the child is the primary consideration in determining issues concerning conservatorship and possession of or access to a child. § 153.002. A court may use numerous factors to determine best interest. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). Those factors, which are not exhaustive, 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 individual seeking custody; (5) the programs available to assist the individual to promote the best interest of the child; (6) the plans for the child by the individual or by the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent that 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. *Id.* In the context of a custody modification, other factors to consider include the child's need for stability and the need to prevent constant litigation in child custody cases. *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000).

#### STANDARD OF REVIEW

Findings in a conservatorship case are reviewed under the ordinary legal and factual sufficiency standards.<sup>4</sup> *In re A.L.H.*, 515 S.W.3d 60, 80 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). In reviewing evidence for legal sufficiency, we view the evidence in the light most favorable to the finding, crediting favorable evidence if a reasonable fact finder could, and disregarding contrary evidence unless a reasonable fact finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 822, 827 (Tex. 2005). A factual sufficiency review requires us to examine the entire record and set aside a finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *In re A.L.H.*, 515 S.W.3d at 80. The fact finder is the sole judge of the credibility of the

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<sup>4</sup> Essentially, a challenge to the sufficiency of the evidence in a family law matter is a component of an overarching abuse-of-discretion analysis. *Willett v. Rodriguez*, No. 03-16-00084-CV, 2017 Tex. App. LEXIS 5096, at \*6 n.11 (Tex. App.—Austin June 2, 2017) pet. denied, 17-0691, 2017 Tex. LEXIS 1085, at \*1 (Tex. Dec. 1, 2017) (mem. op.) (citing *Zeifman*, 212 S.W.3d at 587).

witnesses and the weight to be given their testimony. *City of Keller*, 168 S.W.3d at 819. In conducting our review, we may not substitute our judgment for that of the fact finder's even if we would reach a different answer on the same evidence. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998), *cert denied*, 525 U.S. 1017, 119 S. Ct. 541, 142 L. Ed. 2d 450 (1998).

A trial court's order modifying conservatorship is reviewed for abuse of discretion. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982); *Nichol v. Nichol*, No. 07-12-00035-CV, 2014 Tex. App. LEXIS 492, at \*7 (Tex. App.—Amarillo Jan. 15, 2014, no pet.) (mem. op.). Absent a clear abuse of discretion, the trial court's order modifying the prior order will not be disturbed on appeal. *In re M.S.F. and M.S.F.*, 383 S.W.3d 712, 715 (Tex. App.—Amarillo 2012, no pet.).

In reviewing a trial court's decision for abuse of discretion, we determine whether the trial court acted without reference to any guiding rules and principles or, alternatively, whether the trial court's actions were arbitrary and unreasonable based on the circumstances of the case. *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 315 S.W.3d 28, 31 (Tex. 2010) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985)). The fact that a trial court may decide a matter within its discretion in a different manner than an appellate court in a similar circumstance does not demonstrate an abuse of discretion. *Downer*, 701 S.W.2d at 242.

#### ISSUES ONE AND TWO

Arguing her two issues simultaneously, Elizabeth complains that the trial court's finding of a material and substantial change of circumstances between rendition of the

decree of divorce and appointment of Elias as the joint conservator with the exclusive right to establish the children's domicile are unreasonable and not supported by sufficient evidence. For the reasons to follow, we disagree.

#### MATERIAL AND SUBSTANTIAL CHANGE

The trial court made a finding that a "material change of circumstances" had occurred since rendition of the April 2013 divorce decree. An opposing party's pleadings can constitute a judicial admission that may substitute for evidence that has a "conclusive effect and bars the admitting party from later disputing the admitted fact." See *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001). Here, in her counter-petition, Elizabeth alleged as follows:

[t]he circumstances of the children, a conservator, or other party affected by the order to be modified have materially and substantially changed since the date of rendition of the order to be modified.

As argued by Elias, the allegation precludes her from asserting on appeal that there were no material and substantial changes in the circumstances of the children, a conservator, or other affected party since rendition of the 2013 decree of divorce. See *In the Interest of R.A.W.*, No. 07-13-00316-CV, 2015 Tex. App. LEXIS 3039, at \*5 (Tex. App.—Amarillo March 27, 2015, no pet.) (mem. op.) (finding that mother had judicially admitted an essential element of the father's case for modification). See also *In the Interest of N.L.M.-B.*, No. 07-17-00131-CV, 2017 Tex. App. LEXIS 7169, at \*5 (Tex. App.—Amarillo July 31, 2017), pet. denied, No. 17-0751, 2017 Tex. LEXIS 1020, at \*1 (Tex. Oct. 27, 2017) (mem. op.).

## BEST INTEREST

Here, the trial court found that appointing the parties joint managing conservators with Elias having the exclusive right to designate the children's primary residence was in the children's best interest. To support that finding, in his brief, Elias references notes in the trial court's docket sheet questioning Elizabeth's credibility. We do not, however, consider those notations as any evidence supporting the trial court's findings. Because docket sheet notations are not evidence, we will not consider them in our review. *Davis v. West*, 433 S.W.3d 101, 109 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

Other evidence, however, established that since the divorce, Elias became employed as a custodian for his church, earning more income than at his previous job. His employment hours provide him with flexibility to care for his children. He has three older children in addition to his two children with Elizabeth. He has lived in the same four-bedroom house since before the divorce and has been the primary caregiver to his three older children.

His pastor/employment supervisor, co-workers, and a neighbor all testified that Elias is an excellent father, a conscientious employee, and a very dependable person. They all described the children as being happy and outgoing without any concerns for their physical or emotional well-being.

Taking a contrary position, Elizabeth alleged that her children had contracted lice while in Elias's care. Elias testified, however, those were mere allegations and he had not seen any indications of lice in his home. He testified his children were in good health



except for his daughter's difficulty in gaining weight. In response to that concern, Elias took her to a doctor who subsequently prescribed vitamins.

Elias also testified that while in his care, the children were doing well in school. As a family, they enjoyed fishing, camping, and hiking. They are also very involved in church activities.

During cross-examination, Elias was questioned about his epilepsy medications, his suspended driver's license, lack of health insurance for his children, and his arrears on rent. He explained that his license was suspended for unpaid tickets but that he does have an occupational license. He also testified he believed his children were on Medicaid, but he wanted to find them affordable health insurance. Regarding his past-due rent, Elias explained that he rents his home from his attorney's wife and makes a substantial payment to her at the beginning of the year and then helps with property taxes to make up his arrears.

Testimony also established that Elizabeth has moved five times since the divorce and has had numerous jobs. She has also given birth to a third child who is not her fiancé's child. Significant to her credibility with the court, she made material misrepresentations in an affidavit regarding the length of the children's residency in San Angelo to support her motion to transfer venue to Tom Green County. She also falsely claimed that her daughter made an outcry of being sexually assaulted by a person in Elias's home. The case was closed after police found no evidence to support that claim. Furthermore, she allowed her father, a person with a violent alcoholic past, to live in her home in violation of court orders. Elizabeth testified that at one time she had a serious

drinking problem and was drunk while caring for her third child and drunk while driving with the child in the car. Elizabeth also admitted to giving false testimony in a hearing involving her third child's paternity. Based on the record before us, we conclude the trial court's order is supported by the evidence. Therefore, we find no abuse of discretion in the trial court's appointment of Elias as the joint conservator with the exclusive right to determine the children's domicile. Issues one and two are overruled.

#### CONCLUSION

The trial court's *Order in Suit to Modify Parent-Child Relationship* is affirmed.

Patrick A. Pirtle  
Justice