# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-16-00496-CV**

**Bryan Mitchell, Appellant**

**v.**

**Jessica Wright, Appellee**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 261ST JUDICIAL DISTRICT**
**NO. D-1-FM-08-005048, HONORABLE TIM SULAK, JUDGE PRESIDING**

## M E M O R A N D U M  O P I N I O N

Appellant Bryan Mitchell and appellee Jessica Wright are the parents of J.K.M.W. (the child). In a 2009 order entered in a suit affecting the parent-child relationship, Wright was appointed the child's sole managing conservator, Mitchell was appointed the child's possessory conservator, and the primary residence of the child, who was one year old, was limited to Travis County and those counties contiguous to Travis County. In July 2015, Wright filed a petition to modify the 2009 order, seeking to have the geographic residency restriction lifted. Following a hearing, the trial granted the requested modification. On appeal, Mitchell challenges the lifting of the geographic residency restriction. Because we conclude that the trial court did not abuse its discretion in lifting the restriction, we affirm the trial court's order.

## BACKGROUND[1]

The hearing on Wright's petition to modify the 2009 order occurred in April 2016. Wright, who was the child's primary caregiver, sought to lift the geographic residency restriction because she was engaged and planned to move with the child, who was seven years old at the time of the hearing, to Vancouver, Washington, to live with her fiancé. The witnesses at the hearing were the parties, Mitchell's mother, and the guardian ad litem.

Much of the evidence at the hearing on the parties' circumstances was undisputed. The evidence showed that Mitchell and Wright were never married to each other and that they had ongoing conflicts with each other, primarily over Mitchell's possession and access to the child. At the time of the modification hearing, Mitchell was married to another woman and had another child, and he had not consistently followed the possession schedule in the 2009 order, been involved at the child's school, or attended extracurricular activities,[2] although he and his family had maintained a relationship with the child throughout the child's life. He also was behind on child support payments to Wright. He was unemployed but looking for work in the "tech industry . . . that pays a decent

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[1] Because the parties are familiar with the facts of the case and its procedural history, we do not recite them in this opinion except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4.

[2] Wright testified at the hearing that Mitchell had only met one teacher when the child was two-and-a-half years old and in speech therapy. She also answered "No, he doesn't" when asked whether Mitchell attended "events, plays, awards, things like that."

amount of money."[3] According to Mitchell, he was "very hireable" with "lots of experience in computer software"—a "tech guy."

The parties' primary disputes were the reason behind Mitchell's inconsistent contact and possession of the child and the effect that the move would have on the child and on Mitchell's relationship with the child. According to Mitchell, Wright blocked communications, failed to share information regarding the child, alienated the child from Mitchell, and prevented him from exercising his rights to possession and access on an ongoing basis throughout the child's entire life. Mitchell and his mother also testified that moving the child to Vancouver would be detrimental to the child. They described the child's relationship with extended family and friends in the Austin area that would be affected if the child moved.

Wright testified about her plans to move into her fiancé's home in Vancouver with the child. According to Wright, her fiancé was successfully self-employed, and the child had developed a close relationship and communicated with him "almost every day." Wright also testified about the school that the child would attend and other anticipated activities if they move to Vancouver and that she and the child were temporarily living with her parents to "save money" for the move. Wright denied that she was the reason that Mitchell had not exercised his right to possession consistently and that a standard possession order for parents living more than 100 miles apart actually would give Mitchell the right to more possession than he had been taking under the 2009 order. Her plan for maintaining the child's relationship with Mitchell was "extended

[3] Mitchell was laid off in July 2015 and began receiving unemployment benefits in October 2015. Mitchell testified at the hearing that, although he was laid off and receiving unemployment benefits, he had earned some income by doing "concert promotions" and "odd jobs."

visitation" and "holidays," and she testified that she was willing to share travel costs. She also testified that her current employer had agreed to transfer her to Vancouver and that the child was "ready for the adventure" and "very, very, very excited" to move. In her opinion, moving was in the child's best interest, and they were both going to have a "better life."

The guardian ad litem testified that she had limited contact with Mitchell, but she had contact with Wright, including a home visit, and contact with the child, including a school visit. In her interview with the child, she used a tool—"structured assessment for children in relationships and families" (SCARF) booklet—and, based on her interactions with the child, she testified that the child "obviously he sounds like he wants to go." She also testified that she did not find a reason to believe that Wright would not support the relationship between Mitchell and the child going forward or that Wright talked badly about Mitchell in front of the child, and she did not think that the child was coached prior to her contact with the child.

Following the hearing, the trial court granted the modification lifting the geographic residency restriction. In its order, the trial court found that the material allegations in the petition to modify were true and that the requested modification was in the child's best interest. The trial court also terminated Mitchell's child support obligation "to offset the cost of long-distance travel for [him] to exercise his periods of possession with the child" and found that the termination of the child support obligation was in the child's best interest. Mitchell thereafter filed a motion for new trial that was overruled by operation of law. This appeal followed.

## ANALYSIS

In one issue, Mitchell argues that the trial court abused its discretion by lifting the geographic residency restriction and allowing Wright and the child to move from Austin, Texas, to Vancouver, Washington. Mitchell argues that Wright failed to establish that a material and substantial change in circumstances had occurred and that the trial court abused its discretion and thus erred by finding that lifting the geographic residency restriction was in the child's best interest. *See* Tex. Fam. Code § 156.101(a)(1) (allowing court to modify order governing conservatorship of child if modification would be in child's best interest and if circumstances of parents or child have "materially and substantially changed" after "date of the rendition of the order").

### Standard of Review

"A trial court's order modifying a joint managing conservatorship will not be disturbed on appeal unless the complaining party can show a clear abuse of discretion." *Echols v. Olivarez*, 85 S.W.3d 475, 477 (Tex. App.—Austin 2002, no pet.); *see Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985) (explaining that trial court abuses its discretion when it acts in arbitrary or unreasonable manner or without reference to guiding principles). This standard involves "a two-pronged inquiry: (1) whether the trial court had sufficient information on which to exercise its discretion; and (2) whether the trial court erred in its application of discretion." *Echols*, 85 S.W.3d at 477–78. "The traditional sufficiency review comes into play with regard to the first question," followed by a determination of "whether, based on the elicited evidence, the trial court made a reasonable decision." *Id.* at 478. The fact that we might decide the issue differently than the trial court does not establish an abuse of discretion. *Zeifman v. Michels*,

212 S.W.3d 582, 587 (Tex. App.—Austin 2006, pet. denied). "An abuse of discretion does not occur as long as some evidence of a substantive and probative character exists to support the trial court's decision." *Id.*

**Material and Substantial Change in Circumstances**

"In a conservatorship modification action, a threshold inquiry of the trial court is whether the moving party has met the burden imposed upon him of showing a material and substantial change; otherwise the trial court must deny the motion to modify." *Id.* at 589; *see* Tex. Fam. Code § 156.101(a)(1) (requiring court to find that material and substantial change in circumstances of child or parent before court may modify order establishing conservatorship or possession and access). "To prove that a material change in circumstances has occurred, the petitioner must demonstrate what conditions existed at the time of the entry of the prior order as compared to the circumstances existing at the time of the hearing on the motion to modify." *Zeifman*, 212 S.W.3d at 587. "The petitioner must show what material changes have occurred in the intervening period." *Id.* "A court's determination as to whether a material and substantial change of circumstances has occurred is not guided by rigid rules and is fact specific." *Id.* at 593.

Mitchell argues that Wright failed to establish that a material and substantial change in circumstances had occurred because "the changed circumstances that Ms. Wright complained of were created by her and calculated to create the illusion that Mr. Mitchell was intentionally disobeying the Court's possession and access order." He focuses on his explanation for his inconsistent communication and possession of the child. According to Mitchell, Wright alienated him from the child, denied him possession and access to the child, and made a false accusation

against him after he did not agree to allow the child to move to Vancouver. Evidence at the hearing showed that Wright had filed a criminal complaint against Mitchell, accusing him of spitting on her after a process server attempted to serve Mitchell. This incident occurred when Mitchell was attempting to pick the child up for one of his periods of possession and, after this incident, Mitchell did not exercise his right to possession with the child for several months.

Evidence was also offered showing that, after the 2009 order was rendered, Wright became engaged to a man who was living in Vancouver, Washington, obtained an employment opportunity with her current employer in that area, planned to move there to live with her fiancé, and she and the child had begun living with her parents temporarily to save money for the move. *See Warren v. Ulatoski*, No. 03-15-00380-CV, 2016 Tex. App. LEXIS 8650, at *2 (Tex. App.—Austin Aug. 11, 2016, pet. denied) (mem. op.) (observing that parent's remarriage and "change in home surroundings" have been found to establish material and substantial change in circumstances to support modification order); *Miller v. Miller*, No. 03-14-00603-CV, 2015 Tex. App. LEXIS 11319, at *9 (Tex. App.—Austin Nov. 4, 2015, no pet.) (mem. op.) (listing recent examples of material changes in circumstances including "plan to marry"). Crediting this evidence, we conclude that the trial court did not abuse its discretion by finding that Wright established that the circumstances of the child, Wright, or Mitchell had materially and substantially changed after the 2009 order was rendered. *See Zeifman*, 212 S.W.3d at 589; *see also Warren*, 2016 Tex. App. LEXIS 8650, at *2; *Miller*, 2015 Tex. App. LEXIS 11319, at *9.

**Best Interest**

Mitchell also argues that the trial court abused its discretion and thus erred in finding that lifting the geographic residency restriction was in the child's best interest. *See* Tex. Fam. Code § 156.101(a)(1) (requiring court to find that "modification would be in the best interest of the child" before court may modify order establishing conservatorship or possession and access to child); *see also id.* § 153.002 ("The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.").

When determining the best interest of a child in the relocation context, "no bright-line test can be formulated." *Lenz v. Lenz*, 79 S.W.3d 10, 18–19 (Tex. 2002); *see id.* at 15–16, 19 (observing that suits involving custody of children "are intensely fact driven, which is why courts have developed best-interest tests that consider and balance numerous factors" and that, "[g]iven the many relevant factors, courts have explicitly rejected formulaic tests in relocation cases"). As the Texas Supreme Court observed in *Lenz*, the standards for relocation have been reassessed, "moving away from a relatively strict presumption against relocation and toward a more fluid balancing test that permits the trial court to take into account a greater number of relevant factors," in part because of the "[i]ncreasing geographic mobility and the availability of easier, faster, and cheaper communication." *Id.* at 15.

Factors that courts have considered in the relocation context include: (i) the parents' good-faith reasons for and against the proposed move; (ii) a comparison of economic, educational, health, and leisure opportunities for the custodial parent and the child; (iii) whether the child's special needs or talents can be accommodated; (iv) the effect on the child's extended family

relationships; (v) the effect the move would have on the noncustodial parent's visitation and communication and his ability to maintain a full and continuous relationship with the child; (vi) whether the noncustodial parent has the ability to relocate; and (vii) whether a visitation schedule could be arranged that would allow the noncustodial parent to continue a meaningful relationship with the child. *Romero v. Arguello*, No. 03-14-00674-CV, 2016 Tex. App. LEXIS 7703, at *3–4 (Tex. App.—Austin July 21, 2016, no pet.) (mem. op.) (citing *Lenz*, 79 S.W.3d at 15–16); *Deinhart v. McGrath-Stroatman*, No. 03-09-00283-CV, 2010 Tex. App. LEXIS 9040, at *17–18 (Tex. App.—Austin Nov. 10, 2010, pet. denied) (mem. op.); *see Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (setting out nonexhaustive list of factors to be considered in determining best interest).

Mitchell contends that moving the child to Vancouver is not in the child's best interest because the move would "destroy" Mitchell's ability to have a "meaningful" relationship with the child and that Wright would be allowed "to continue to alienate the child from [Mitchell] for whatever reason she sees fit." Mitchell focuses on the evidence of his ongoing conflicts with Wright concerning his possession and access to the child and his concern that if Wright moves and then denies him access to the child, he may be forced to seek relief in a court in Washington, "where he will be at a decided disadvantage." Mitchell further raises concern for the child's well-being if the geographic residency restriction is lifted because, according to Mitchell, Wright "is not able to care for the child on her own," cannot drive, and "has always leaned on her family or friends for help."

In addition to the evidence of the parties' ongoing struggles and assistance to Wright by others with caring for the child, Mitchell focuses on the evidence that he has a loving and close relationship with the child and that the child has spent his entire life in the Austin area, where the child has friends, classmates, and a "large extended family," including both sets of grandparents. Among the evidence presented to the trial court, Mitchell's mother testified that she believes that the move would change the relationship between Mitchell and the child for the worse, that the move would be detrimental to the child, and that the child had a "solid support base" in the Austin area. Mitchell also testified that he planned to stay in the Austin area with his other child and wife, who was employed in Austin. The evidence also showed that the child was doing well, including in his current school. This evidence weighs in favor of a finding that it was not in the child's best interest to lift the geographic residency restriction. *See Lenz*, 79 S.W.3d at 15–16; *see also* Tex. Fam. Code § 153.001(a)(1) (stating that public policy of state is to assure that "children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child").

Other evidence that was presented to the trial court during the hearing, however, weighed in favor of a finding that lifting the geographic residency restriction was in the child's best interest. Wright, who was the child's primary caregiver, testified about her plans if the geographic residency restriction was lifted, including testifying about her employment opportunity in the Vancouver area; the house in which she and the child would be living; the child's relationship with her fiancé, including daily contact; and the child's anticipated school and other activities. It was for the trial court as the sole judge of the witnesses' credibility to resolve the conflicting evidence and then exercise its discretion to make its best-interest determination. *See Echols*, 85 S.W.3d at 477

("The trial court is in the best position to observe the demeanor and personalities of the witnesses and can 'feel' the forces, powers, and influences that cannot be discerned by merely reading the record."); *see also Miller*, 2015 Tex. App. LEXIS 11319, at *7–8 (recognizing that "trial court is in the best position to observe and assess the witnesses and their demeanor" and giving "great latitude to the trial court in determining the best interest of a child"). Also before the trial court was the guardian ad litem's testimony that she did not find reason to believe that Wright would not support the relationship between Mitchell and the child going forward; the evidence that the child wanted to move with his mother; and the evidence concerning the child's anticipated circumstances if the move occurred.

Although the reasons that Mitchell had not consistently exercised his rights to possession and access of the child were disputed, Mitchell conceded that he had not followed the possession schedule consistently, including not exercising his right to possession for several months. Resolving the conflicting evidence, the trial court could have credited Wright's testimony that the standard possession order for parents who live more than 100 miles apart would actually give Mitchell longer possession periods than he had been exercising under the 2009 order. The trial court also could have credited Mitchell's testimony concerning his job prospects in the "tech industry . . . that pays a decent amount of money" and his wife's employment to conclude that he would have the financial means to exercise his periods of possession in the event that the child moved to Vancouver, allowing him the opportunity to have a meaningful relationship with the child. The trial court further facilitated this opportunity by terminating Mitchell's child support obligations "to offset the cost of

long-distance travel for [Mitchell] to exercise his periods of possession with the child" and ordering Wright to share the child's travel costs.

Considering and balancing the numerous relevant factors, we conclude that the trial court did not abuse its discretion in finding that lifting the geographic restriction was in the best interest of the child. *See Lenz*, 79 S.W.3d at 15–16 (observing that relocation decisions determined by "fluid balancing test that permits the trial court to take into account a greater number of relevant factors" in part because of "[i]ncreasing geographic mobility and the availability of easier, faster, and cheaper communication"); *Echols*, 85 S.W.3d at 477; *see also Holley*, 544 S.W.2d at 371–72; *Romero*, 2016 Tex. App. LEXIS 7703, at *15 n.3 (collecting cases in which appellate court affirmed modification decision, concluding no abuse of discretion).

**CONCLUSION**

For these reasons, we overrule Mitchell's issue and affirm the trial court's order.

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Melissa Goodwin, Justice

Before Justices Puryear, Pemberton, and Goodwin

Affirmed

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